Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

FERRELL SECAKUKU, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe,

Petitioner,

vs.

ALBERT HALE, President of the Navajo Nation, for and on behalf of the Navajo Nation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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320 pp

QUESTION PRESENTED

Whether, in determining the extent of Indian land rights under a federal statute, the court of appeals erred in ignoring the historic standard for measuring Indian title set forth in the decisions of this Court and other federal courts — which is based on the particular tribe's traditional land-use patterns and its "habits and modes of life" — in favor of a restrictive, ad hoc standard.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Evelyn James, President of the San Juan Southern Paiute Tribe, was a party before the court of appeals. By virtue of intervening elections, the names of the Chairman of the Hopi Indian Tribe and the President of the Navajo Nation have changed since the Hopi Tribe's appeal was filed in the court of appeals. Those changes are reflected in the caption of this petition.

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Ferrell Secakuku, on behalf of the Hopi Indian Tribe, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The order and amended opinion of the Ninth Circuit (App. A) are reported at *Masayesva v. Zah*, 65 F.3d 1445 (9th Cir. 1995). The opinions and orders of the United States District Court for the District of Arizona (Apps. B and C) are reported at *Masayesva v. Zah*, 816 F. Supp. 1387 (D. Ariz. 1992), and *Masayesva v. Zah*, 793 F. Supp. 1495 (D. Ariz. 1992). Prior interlocutory rulings (Apps. D and E) are reported at *Sekaquaptewa v. MacDonald*, 619 F.2d 801 (9th Cir. 1980), and *Sekaquaptewa v. MacDonald*, 448 F. Supp. 1183 (D. Ariz. 1978).

STATEMENT OF JURISDICTION

The judgment of the court of appeals, as amended, was entered on December 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Act of June 14, 1934, 48 Stat. 960, creating a reservation in northern Arizona for the benefit of the Navajo Indians and "such other Indians as may already be located" on the land, is reproduced in Appendix F. Relevant portions of the Act of Congress waiving the sovereign immunity of the two tribes and authorizing this lawsuit are reproduced in Appendix F.

INTRODUCTORY STATEMENT

The Court should grant a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals below for two

reasons: *First*, that decision will establish, for the indefinite future, the land rights of these two, historically important Indian tribes of the American Southwest — the smaller and culturally intact Hopi Tribe and the Navajo Nation, the largest Indian tribe in the United States. This Court has repeatedly recognized the importance of laws affecting the nation's domestic, dependent sovereigns, the Indian tribes which inhabit this country. *E.g.*, *United States v. Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 344 (1941). *Second*, the Ninth Circuit's judgment is contrary to decisions of this Court and other federal courts, and, unless corrected, will result in profound unfairness to the Hopi Tribe.

STATEMENT OF THE CASE

This is the second of two, century-old disputes between the Hopi Tribe and the Navajo Nation over their historic rights to land in northern Arizona. The first dispute quieted Navajo title to the "Hopi" Reservation established in 1882 (the "1882 Reservation"). *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963).[1] The present dispute concerns Hopi title to the "Navajo" Reservation established in 1934 (the "1934 Reservation"). In both cases, Congress granted the land rights. In both, Congress used similar language to convey those rights. Yet the legal standards applied to determine the extent of those rights, and the results reached, in the two cases are inexplicably at variance.[2]

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1. Because of the importance of *Healing* to the legal argument made by the Hopi Tribe in this petition, a copy of the opinion has been filed in a separate Lodging Appendix and is referenced in Appendix G.

2. A map is attached showing the locations of both reservations. App. H. The area labelled "NPL" (Navajo Partitioned Lands) shows the territory within the 1882 Reservation awarded to the Navajo Nation. The colored area around the Village of Moenkopi shows the territory within the 1934 Reservation awarded to the Hopi Tribe. "HPL" (Hopi Partitioned Lands) refers to the territory within the 1882 Reservation awarded to the Hopi Tribe.

"No Indians in this country have a longer authenticated history than the Hopis," whose presence in northern Arizona can be traced as far back as the Middle Ages. *Healing*, 210 F. Supp. at 134. The Hopis are a pueblo people. They live in villages, where year-round religious ceremonies are performed, and have traditionally used land surrounding the villages as needed for subsistence and religious purposes.

The Navajos are an Athapaskan people who entered what is now Arizona in the 18th century, perhaps earlier. *Id.* at 134-35. By the latter half of the 19th century, Navajos had assumed a "pastoral" lifestyle. With their herds of sheep they lived in kinship groups spread over a large area, often moving with the seasons in search of forage and water.

Navajo incursions into traditional Hopi territory, and their depredations against the Hopi, are well documented. The Hopis were " 'constantly overridden by their more powerful Navajo neighbors.' " *Id.* at 136 (citation omitted). In the late 1800s, "civil and military officials reported instances in which Navajos had trespassed upon Hopi gardens and grazing lands, seized and carried away livestock, and committed physical violence." *Id.* at 136, n.6. By Executive Order in 1882, President Chester A. Arthur created a reservation whose primary purpose was "protecting the Hopis from white intermeddlers, Mormon settlers, and encroaching Navajos." *Id.* at 137. The 1882 Reservation was "set apart for the use and occupancy of the Moqui [Hopi], and such other Indians as the Secretary of the Interior may see fit to *settle* thereon." *Id.* at 129, n.1 (emphasis added). The "other Indians" language was included because there were already some Navajos living in the region. *Id.* at 137-43.

In 1934 Congress created a larger reservation entirely surrounding the 1882 Reservation, for the benefit of the "Navajo

and such other Indians as may already be *located* thereon . . . ." App. F ("1934 Act") (emphasis added). This "other Indians" language was intended to include the Hopis, whose Village of Moenkopi was located within the 1934 Reservation. App. E at 286a. At meetings in Hopi villages prior to passage of the 1934 Act, the Indian Office reassured the Hopi Tribe that its adoption would not diminish their historic occupancy rights: "'Now I want you to especially bear in mind that by the "as may already be located thereon"[,] that is put in the bill to especially protect the rights of the Hopi Indians to the lands they occupy around here and there is absolutely no chance of the Hopis' rights to their lands being disturbed.' " *Id.* at 289a-290a (remarks of Mr. Stewart).

Due to increasing conflicts over the use of the land within the 1882 Reservation, caused principally by Navajo grazing, Congress in 1958 authorized a lawsuit between the two tribes to determine title to land within the reservation.[3] In 1974, Congress authorized a similar lawsuit to settle rights to the 1934 Reservation. App. F. The 1958 Act resulted in the *Healing v. Jones* lawsuit. The 1974 Act led to this lawsuit.

In *Healing*, the issue was what rights the Navajo Nation possessed in the 1882 Reservation. Resolution of that issue required the three-judge court sitting in the District of Arizona to decide whether Navajos had been "settled" within the 1882 Reservation and, if so, where. The district court held that Navajos had been settled in approximately two-thirds of the reservation because the Secretary of the Interior had intended to settle them there *and* because they "used and occupied the reservation, in Indian fashion, as their continuing and permanent

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3. Congress also enacted the 1882 Executive Order in the same statute, 72 Stat. 402, thus permanently vesting both Hopi and Navajo rights. *Healing*, 210 F. Supp. at 145 n.23.

area of residence . . . ." *Healing*, 210 F. Supp. at 144. This legal standard for determining the extent of Navajo title had been urged upon the *Healing* court by the Navajo Nation. The standard originated in decisions of this Court and the Court of Claims adjudicating aboriginal Indian title. *Id.* at 143 and n.20. Based upon that standard, the three-judge court entered judgment awarding the Navajo Nation an undivided one-half interest in more than 1.8 million acres of the 2.5 million acre Hopi Reservation. This Court affirmed without opinion. *Jones v. Healing*, 373 U.S. 758 (1963).

In 1974 the Hopi Tribe filed this lawsuit against the Navajo Nation to quiet title to the 1934 Reservation and partition it. After an interlocutory appeal,[4] the district court ordered two trials, the first on title and the second on partition. The Navajo Nation did not dispute that the Hopi Tribe was "located" on the 1934 Reservation in 1934. The principal issue, therefore, was the extent of the Hopi claim. Using as its guide cases from this Court, the Court of Claims, and the Indian Claims Commission ("ICC") defining the contours of Indian title, the Hopi Tribe offered proof in the title phase that in 1934 it had "used, possessed, or occupied," in its customary and traditional fashion, some three million acres of the 1934 Reservation, much of which had also been used by Navajos. Uncontradicted evidence showed that Hopis both from Moenkopi and from the mesas inside the 1882 Reservation made regular use of the 1934 Reservation for a variety of traditional activities, such as residence, farming, grazing, gathering eagles for ceremonial purposes, visiting shrines, hunting, gathering plants, and obtaining materials for economic and religious purposes. Further uncontradicted evidence showed that these activities were, and continue to be, essential to the Hopi way of life.

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4. The interlocutory appeal followed the district court's denial of cross-motions for summary judgment (App. E); but this earlier decision of the Ninth Circuit (App. D) did not resolve the legal issue presented in this petition.

The district court rejected the Hopi Tribe's proffered legal standard. Drawing a distinction between *aboriginal* (historical) and *recognized* (congressional) title, the court specifically declined to "apply the same standard regarding the *intensity* of 'possession, occupancy, and use' required to establish aboriginal title." App. B. at 44a. It reasoned that those terms have a "special meaning" where the issue is compensation to an Indian tribe for loss of its aboriginal land rather than title to the land itself. *Id.* at 44a-45a.

Focusing instead upon the word "located" in the 1934 Act, the district court created a new standard requiring greater intensity of use:

> The Court finds that the use by Hopi Indians must be *substantial* and *sufficiently intensive* in order to create a property interest in the 1934 Reservation, though the use does not have to be for subsistence purposes. Use by a few isolated individuals, especially when away from traditional use areas of that individual's Tribe, and irregular or sporadic uses are not sufficient. However, since seasonal use is pervasive in Indian land use patterns, and indeed, necessary in the harsh environment of the 1934 Reservation, substantial seasonal use is sufficient for this Court to find occupation or use of the land.

Id. at 45a-46a (emphasis added).

Based on this unprecedented standard, the trial court rejected the historic Hopi land claim almost in its entirety. Traditional land uses other than residence, farming, and "intensive" grazing were found insufficient to create a property

interest. *Id.* at 112a-122a. Thus, the gathering of plants for food and medicine, the collection of materials for tools and crafts, hunting, and similar practices were disqualified. *Id.* at 117a-122a. In addition, the district court held that religious activities, by their nature, did not create a property interest. *Id.* at 112a-117a.

After a second proceeding devoted to partition, the district court held that the Hopi Tribe had exclusive title to some 22,600 acres immediately adjacent to the Village of Moenkopi and a joint interest with the Navajo in 153,000 acres near the village. Because of concerns about relocating Navajos, however, the district court awarded the Hopi Tribe only one-fourth of the joint land. The effect of ignoring traditional Hopi land use was to award the tribe only 61,000 of the 7,500,000 acres comprising the 1934 Reservation, less than one percent.

On appeal, the Ninth Circuit affirmed and reversed in part. While rejecting the district court's view that religious uses could not create an interest in land and remanding for further proceedings solely on that issue, the court affirmed the trial court's basic legal test for determining Hopi title to the 1934 Reservation:

> We assume for purposes of discussion, without deciding, that the Hopis are correct in their argument that the district court imposed a more stringent requirement than the one which has evolved in aboriginal title cases. We conclude, nevertheless, that the district court correctly construed the statutory phrase "located" in this statute.

App. A at 9a-10a.

After reviewing the scope of its prior opinion, the Ninth Circuit found that the district court's construction of the word "located" in the 1934 Act was "consistent with the ordinary meaning of the word." *Id.* at 10a. It rejected the Hopis's contention that, when measuring the extent of their statutory grant, the "other Indians" clause should be interpreted to mean the same thing as "possession, occupation, or use" in the decisions of this Court, the Court of Claims, and the ICC. The Ninth Circuit gave three reasons for its conclusion: (1) the ICC was created and authorized to compensate Indian tribes for land taken by the United States; (2) the ICC line of cases began 12 years after the 1934 Act was adopted; and (3) the 1934 Act case concerned recognized, not aboriginal, title. *Id.* at 11a-13a.

REASONS FOR GRANTING THE WRIT

This case is the culmination of an historic land dispute between two prominent Indian tribes that has been described as "the greatest title problem of the West . . . ." *Healing,* 210 F. Supp. at 129. A dispute of such magnitude between Native American sovereigns is, by itself, reason for this Court to grant the writ. But there are other reasons as well. The judgment of the court of appeals is fundamentally inconsistent with prior decisions of this Court, with *Healing* *Jones*, and with rulings by the Court of Claims and the ICC. It is also profoundly unfair to the Hopi Indian Tribe.

The Hopi Tribe is unaware of a single reported decision from a court of the United States that supports the rulings below. In an unbroken line of cases extending over more than 150 years, this Court, the Court of Claims, and the ICC have held that the extent of Indian title is measured by the "habits and modes of life" of the particular tribe. *Mitchel v. United States*, 9 Pet. (34 U.S.) 711, 746 (1835); *United States v. Santa Fe Pacific Railroad Company,* 314 U.S. 339, 345-46 (1941); *Sac and Fox Tribe of*

Indians of Oklahoma v. United States, 383 F.2d 991, 998 (Ct. Cl. 1967); *Alcea Band of Tillamoots v. United States*, 59 F. Supp. 934, 962-63 (Ct. Cl. 1945). In measuring the extent of Indian title, consideration is properly given to a variety of "life-sustaining activities, including farming, hunting, grazing, gathering, worshipping, and a host of other activities." *Zuni Tribe of New Mexico v. United States*, 12 Cl. Ct. 607, 608 (1987).

The Ninth Circuit's Ruling Ignores The Plain Meaning of the Statute

The Ninth Circuit's departure from the Indian title cases cannot be explained merely by announcing that the "district court's construction is consistent with the ordinary meaning" of the word "located." App. A at 10a. There is more to the case than the interpretation of a sin

gle word. It is obvious that the phrase "other Indians located thereon" in the 1934 Act, like the phrase "other Indians as the Secretary . . . . may . . . settle thereon" in the 1882 Executive Order, was inserted merely to identify those Indian tribes who were to have an interest in the reservation. In neither case did the phrase define the extent of that interest. The 1934 Congress was not partitioning the reservation. It did not even identify, by name, what tribes might be "located" within the reservation boundaries, much less determine the reach of their respective domains. The fact that Congress left for future determination the extent of both tribes' "recognized" title, based on their usage of the land, does not require or even suggest that the *extent* of such usage should be determined by a standard other than the traditional land-use patterns of the tribes. The Ninth Circuit read into the word "located" a world of meaning that Congress neither expressed nor reasonably could have intended.

The Ninth Circuit's Distinction Between Aboriginal and Recognized Title Ignores History

The Ninth Circuit ignores well settled American history when it suggests that the patterns of land use considered in determining "recognized" title are different from those considered when determining "aboriginal" title. App. A at 10a-13a. The right of Indian tribes, subject to the superior title of the United States, to the occupation, possession and use of their traditional lands was first set out by Chief Justice Marshall in *Johnson and Graham's Lessee v. McIntosh,* 8 Wheat. (21 U.S.) 543, 574 (1823). It seems never to have been doubted that "Indian possession or occupation was considered with reference to their habits and mode of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way and for their own purposes was as much respected . . . ." *Mitchel,* 9 Pet. (34 U.S.) at 746. It is instructive that *Mitchel* dealt not with compensation for loss of aboriginal rights but with actual title to land in East Florida derived from Spain. *Id.* at 715. Other cases treating Indian title from the tribe's perspective likewise have involved construction of congressional grants. *E.g., United States v. Santa Fe Pacific Railroad, supra; United States v. Shoshone Tribe of Indians,* 304 U.S. 111 (1938). There is no basis for concluding that Congress intended a different standard in the 1934 Act.[5]

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5. The district court, but not the Ninth Circuit, regarded as significant the fact that the Hopi Tribe was compensated for loss of its aboriginal rights. App. B at 45a. However, it disregarded the fact that the Navajos have been similarly compensated. *See Navaho Tribe v. United States,* 228 Ct. Cl. 924 (1981). In settling its ICC claim, the Hopi Tribe specifically excepted rights conferred by the 1934 Act. *Hopi Tribe v. United States,* 39 Ind. Cl. Comm. 204, 211 (Dec. 2, 1976) (findings of fact and conclusions of law on compromise settlement).

Against this background, it is not surprising that, when it came to determining the extent of its own rights to the 1882 Reservation, the Navajo Nation relied upon the Indian title cases; nor is it surprising that *Healing*, itself a recognized title case, applied that historic standard. *Healing*, 210 F. Supp. at 143-44. It is revealing that the Ninth Circuit makes no attempt to distinguish *Healing* on this critical point, but instead merely ignores it. App. A at 8a-14a.

Additional reasons advanced by the Ninth Circuit for its ruling are similarly unpersuasive. The fact that the ICC came into existence 12 years after the 1934 Act was adopted certainly does not distinguish *Healing*, which was decided in 1961 and construed an executive order issued in 1882. Moreover, the legal standard applied in the ICC cases originated not with that body but in decisions rendered by this Court many years prior to 1934. *See, e.g., Sac and Fox Tribe*, 383 F.2d at 998 (citing *Mitchel v. United States*, 9 Pet. (34 U.S.) at 746). *See also Alcea Band of Tillamoots*, 59 F. Supp. at 962-63, and cases discussed therein.

This Case and *Healing* Are in Conflict

In construing the "other Indians" clause in the 1882 Executive Order, the *Healing* court described it as a "customary provision in executive orders of that period," citing, for example, a reservation "set aside for named bands of Indians in Washington Territory, and for such other Indians as the Dept. of Interior may see fit to *locate* thereon." *Healing*, 210 F. Supp. at 140 (citations omitted). Between 1872, the date of that executive order, and 1882, the *Healing* court noted, there had been nine other executive orders whose land grants were framed in similar terms. *Id.*[6] There is no suggestion in *Healing* that the court

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6. In support of this observation, the *Healing* court cited Hopi Exhibit 263, which described 54 executive orders adopted between 1861 and 1918. A (Cont'd)

thought modest variations in the language of these orders were intended to convey fundamentally different meanings. On the contrary, the *Healing* court seems to have regarded the words "settled" and "located" as synonyms. *See id.* So did the Ninth Circuit in this case. App. A at 10a. That concession may have been a slip of the pen because the two decisions cannot be reconciled. *Healing* read "settled" merely as designating the Navajo Nation as a beneficiary of the 1882 Executive Order. It then had resort to Indian title law to determine the reach of the Navajo interest. *Healing*, 210 F. Supp. at 143-45 & n.20.

The difference between *Healing* and this case is profoundly unfair to the Hopi Tribe. When the question was Navajo rights in the Hopi Reservation, the approach of the *Healing* court was generous, taking into account the Navajo perspective on land use. As a result, the Navajos ultimately received one-third of the Hopi Reservation. When the issue was Hopi rights in the Navajo Reservation, however, the historic standard for determining Indian title was abrogated in favor of an unprecedented test so restrictive that the Hopi interest in the Navajo Reservation was held to be less than one percent of the grant.

The Ruling Below Is Unprincipled

The Hopi Tribe submits that the decision of the district court was guided not by adherence to legal principles, which are well established, but by the importance it frankly attached to achieving a particular result. Since 1934, the population of the Navajo Nation has grown by 10 times to nearly 300,000

(Cont'd)
copy of that exhibit has been filed in a separate Lodging Appendix and is referenced in Appendix I. Even a brief glance at the list — and the wide variety of expressions used to identify Indian beneficiaries of land rights — demonstrates beyond fair debate how mistaken the Ninth Circuit was in its interpretation of the word "located" in the 1934 Act.

members.[7] Awarding land to Hopis would inevitably have complicated the *status quo*. The district court, applying its ad hoc legal test, drew a partition line so as to avoid locating even a single Navajo on land partitioned to the Hopi Tribe and thus subjecting that person to the risk of relocation. So determined was the court to avoid any possibility of relocation that it awarded the Hopi Tribe a mere one-fourth of the minuscule amount of land it found, under its restrictive standard, to have been jointly occupied by the two tribes in 1934. To the purpose of avoiding relocation the district court sacrificed all other values, most significantly the even-handed application of law.

The district court erred, as did the court of appeals, not simply because their rulings ignore prior opinions of this and other courts, nor simply because they sacrifice the Hopi land claim to expediency, but also because their rulings are unnecessary. Relocation can be avoided without arbitrarily divesting the Hopi of their land. An accommodation of existing Navajo residents is certainly possible. Failing that, the United States has the power of eminent domain. That would be the way to avoid relocation and still follow the law. But to take Hopi land without paying for it, and to do it in the name of law, is a gross miscarriage of justice that the Hopi Tribe calls upon this Court to remedy.

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7. The Navajo Reservation has grown from two million acres in 1868 to some 17 million acres today, an area larger than West Virginia. The reservation of the 8,000-member Hopi Tribe has shrunk since 1882 from 2.4 to 1.6 million acres, entirely to the benefit of the Navajo Nation.

CONCLUSION

For the reasons set forth above, the Hopi Tribe asks that this Court grant its petition for a writ of certiorari to review the judgment of the court of appeals in this matter.

Respectfully submitted,

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APPENDIX A — ORDER AND AMENDED OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 5, 1995

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-15109

D.C. No.
CV-74-00842-EHC

VERNON MASAYESVA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe;

Plaintiff-Appellant,

v.

PETERSON ZAH, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe,

Defendant-Appellee.

EVELYN JAMES, et al.,

Intervenor.

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the District of Arizona
Earl H. Carroll, District Judge, Presiding

Appendix A

Argued and Submitted
May 9, 1995 — San Francisco, California

Filed September 11, 1995
Amended December 5, 1995

Before: Herbert Y. C. Choy, Cecil F. Poole
and Andrew J. Kleinfeld, Circuit Judges.

Opinion by Judge Kleinfeld

* * *

COUNSEL

James E. Scarboro. Arnold & Porter, Denver, Colorado, for the plaintiff-appellant.

Terry E. Fenzl, Brown & Bain, Phoenix, Arizona, for the defendant-appellee.

ORDER

The opinion filed on September 11, 1995, slip op. 11323, and appearing at 65 F.3d 1445 (9th Cir. 1995), is ordered amended as follows:

Slip op. page 11339, first sentence of the first full paragraph; 65 F.3d at 1455, first sentence of second full paragraph, amend to read:

> "We remand, so that the district court can award identifiable locations regularly and

> exclusively used for religious observances or activities by the Hopis to that tribe. Locations that were regularly used by both Hopis and Navajos may be determined to be subject to partition "on the basis of fairness and equity." 25 U.S.C. § 640d-7(b)."

With this amendment, the panel has voted to deny the petition for rehearing. Judge Poole and Judge Kleinfeld vote to reject the suggestion for rehearing en banc. Judge Choy so recommends.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected.

OPINION

KLEINFELD, Circuit Judge:

We affirm in most but not all respects the district court decision dividing land between the Hopi and Navajo tribes. The issues arise from application of a statute Congress passed to deal specifically with this dispute.

I. Litigation History.

For centuries, the Hopi and Navajo peoples have disagreed on their tribes' respective rights to lands in northeastern Arizona. The dispute has been the subject of extensive litigation and

legislation. *See, e.g., Hopi Tribe v. Navajo Tribe,* 46 F.3d 908 (9th Cir. 1995), *citing Healing v. Jones,* 210 F. Supp. 125, 129 (D. Ariz. 1962), *aff'd,* 373 U.S. 758 (1963) (per curiam). After a district court decision in 1978, *Sekaquaptewa v. MacDonald,* 448 F. Supp. 1183 (D. Ariz. 1978), we remanded for additional findings. *Sekaquaptewa v. MacDonald,* 619 F.2d 801 (9th Cir. 1980). The judgment we review now is based on three separate decisions: *Masayesva v. Zah,* 816 F. Supp. 1387 (D. Ariz. 1992) (partitioning land and lifting development freeze); *Masayesva v. Zah,* 793 F. Supp. 1495 (D. Ariz. 1992) (deciding question of where Hopis were located in 1934); *Masayesva v. Zah,* 792 F. Supp. 1155 (D. Ariz. 1992) (holding land acquired from railroads not subject to Hopi claims).[1]

On December 16, 1882, President Chester Arthur by executive order set aside land in northeastern Arizona "for the use and occupancy of the Moqui [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon." *Hopi Tribe v. Navajo Tribe,* 46 F.3d 908, 911 (9th Cir. 1995). The Hopi 1882 reservation has been the subject of much litigation between the Navajo and Hopi tribes. *See, e.g., id.; Sekaquaptewa v. MacDonald,* 575 F.2d 239 (9th Cir. 1978); *Hamilton v. MacDonald,* 503 F.2d 1138 (9th Cir. 1974); *Healing v. Jones,* 210 F. Supp. 125 (D. Ariz. 1962); *Healing v. Jones,* 174 F. Supp. 211 (D. Ariz. 1959).

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1. The district court also decided claims to the Navajo Reservation brought by the San Juan Southern Paiute Tribe. These decisions are not before us in the present appeal. *See Masayesva v. Zah,* 794 F. Supp. 899 (D. Ariz. 1992); *Masayesva v. Zah,* 792 F. Supp. 1165 (D. Ariz. 1992); *Masayesva v. Zah,* 792 F. Supp. 1178 (D. Ariz. 1992). Certain other decisions in this case are also not before us on appeal. *See Masayesva v. Zah,* 792 F. Supp. 1160 (D. Ariz. 1992); *Masayesva v. Zah,* 792 F. Supp. 1165 (D. Ariz. 1992); *Masayesva v. Zah,* 792 F. Supp. 1172 (D. Ariz. 1992).

Appendix A

A half century later, Congress established a much larger Navajo reservation. Act of June 14, 1934, 48 Stat. 960 (the "1934 Act"). This reservation was not only for the Navajo people, but also for "such other Indians as may already be located thereon," and it did not take away any of the Hopi reservation created in 1882:

> Be it enacted . . . [t]hat the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows . . . . All vacant, unreserved, and unappropriated public lands . . . are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882.
>
> . . .

In 1974, almost a half century after creation of the Navajo reservation, and almost a century after creation of the Hopi reservation, Congress passed a law enabling the Navajo and Hopi tribes to sue each other as a means of settling their continuing dispute over which tribe was entitled to which lands in the 1934 reservation. Each tribe was authorized to sue the other in district court "for the purpose of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes." 25 U.S.C. § 640d-7(a). The Hopis commenced the case at bar in accord with the Congressional authorization.

Appendix A

We addressed the question "[w]hat property interests are conferred by the phrase [in the 1934 Act] 'for the benefit of the Navajo and such other Indians as may already be located thereon?' " in our earlier decision in this case. *Sekaquaptewa*, 619 F.2d at 805. The Hopis had argued that the phrase gave them a half interest in the entire Navajo reservation, because they were "such other Indians as may already be located thereon," and the reservation was conferred for the benefit of the Navajo and "such other Indians . . . ." The district court had held that the Hopis were entitled to interests only in the lands upon which they were located in 1934, and on those lands, they were entitled only to an undivided half interest with the Navajos, not an exclusive interest.

We rejected the interpretation that the statutory phrase conferred joint interests, either in Hopi-occupied land only or in the entire 1934 reservation. We held that it conferred an exclusive interest in the Hopis, but only to the lands they occupied in 1934. We concluded that "[t]he purposes, history, and language of the 1934 Act show an intent to withdraw all reservation land for the Navajos except for pockets occupied by the Hopis. . . . [T]his is the meaning of the 'such other Indians as may already be located thereon' provision." *Id.* at 807. We rejected the district court's decision that "located thereon" created only a half interest in the Hopi-occupied areas of the Navajo reservation. We held that the Hopis were to take such "pockets" exclusively of the Navajos.

> [L]egislative intent is clear enough to enable us to identify Hopi interests by areas settled. Navajo interests are identifiable as the residue. Congress recognized Hopi concern over the 1882 reservation and their villages,

> shrines, and grazing areas outside the 1882 reservation. The "such other Indians" provision was explained to the Hopis as protecting their rights to areas occupied outside the 1882 reservation. . . . We therefore reverse the [district court's] judgment insofar as it limits Hopi interests to an undivided one-half interest in lands they exclusively possessed, occupied, or used in 1934. Judgment should be entered declaring Hopi interests in those lands to be exclusive.

Id. at 808. We then remanded the case with these instructions:

> We remand to the district court to determine what land the Hopis "possessed, occupied, or used" in 1934. In doing so, we acknowledge the possibility that some reservation land, grazing land for instance, may have been used by both tribes in 1934. Even in villages it may not be possible for the court to conclude that the Hopis "possessed, occupied, or used" such land exclusively. In that event it may be proper on remand for the district court to declare title to be joint or undivided, subject to partition. We reverse only with respect to the district court's holding that Hopi title is necessarily non-exclusive, even with respect to land that was actually and exclusively "possessed, occupied, or used" in 1934.

Id. at 809-10 (emphasis added).

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Upon remand, the district court held a bifurcated trial. In the first phase, the court tried the issue of which land was occupied exclusively by the Hopis in 1934, which the parties agreed was the relevant year under the statute. *Masayesva v. Zah,* 793 F. Supp. 1495 (D. Ariz. 1992). In the second phase, the court tried the issue of what to do with lands occupied by both tribes in 1934. *Masayesva v. Zah,* 816 F. Supp. 1387 (D. Ariz. 1992). During this second phase, the court took evidence on contemporary land use and occupancy, for purposes of deciding upon equitable partition. The land occupied by both tribes in 1934 was partitioned by the court, pursuant to 25 U.S.C. § 640d-7(b), which requires that "[a]ny lands in which the Navajo and Hopi Tribes . . . are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity . . . ."

II. Analysis.

A. "Located thereon."

The district court construed the 1934 statutory term "located" to mean something more than the level of possession, occupancy or use which might be use in different contexts to establish aboriginal title. "[T]his court will not apply the same standard regarding the *intensity* of 'possession, occupancy, and use' required to establish aboriginal title. The Hopi Tribe's claims in this case are based on *recognized title* granted by the 1934 Act." *Masayesva,* 73 F. Supp. at 1500 (emphasis in original).[2] Although the district court required more substantial

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2. Recognized title is "title to Indian lands that has been recognized by federal . . . statute." William C. Canby, Jr., American Indian Law 226 (1st ed.

(Cont'd)

occupancy than for aboriginal title, it rejected the Navajo argument that continual physical presence was necessary. Here is the standard that the district court applied to the evidence, in order to determine which pockets of land were occupied by the Hopi tribe:

> The Court finds that the use by Hopi Indians must be substantial and sufficiently intensive in order to create a property interest in the 1934 Reservation, though the use does not have to be for subsistence purposes. Use by a few isolated individuals, especially when away from traditional use areas of that individual's Tribe, and irregular or sporadic uses are not sufficient. However, since seasonal use is pervasive in Indian land use patterns, and indeed necessary in the harsh environment of the 1934 Reservation, substantial seasonal use is sufficient for this Court to find occupation or use of the land.

Id. at 1501.

The Hopis argue that this standard was erroneous as a matter of law, because it required more intensive use and occupancy than the aboriginal title cases ordinarily do. We assume for purposes of discussion, without deciding, that the Hopis are correct in their argument that the district court imposed a more

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(Cont'd)
1981). "The nature and extent of the rights and title of Indians in a reservation . . . are measured by the terms of the governing act or treaty." 42 C.J.S. Indians § 72(b) (1991).

stringent requirement than the one which has evolved in aboriginal title cases. We conclude, nevertheless, that the district court correctly construed the statutory phrase "located" in this statute.

Our use of the phrase "possessed, occupied, or used" in our 1980 decision was not intended to import a particular level of intensity into the level of usage which would suffice under the statutory term "located." We used the terms 'settled" and "occupied" as well. We did not distinguish which of these different levels of intensity were sufficient to satisfy the statutory term "located," because that was not the issue we were deciding. We were resolving the question of whether the statute conferred to the Hopi tribe a half interest in the whole reservation, a half interest in the areas the tribe occupied, or an exclusive interest in the areas occupied. The district court was correct, on remand, in not reading into the phrase "possessed, occupied or used" a decision on the intensity of use. *See United States v. Andrade-Larrios,* 39 F.3d 986, 990 (9th Cir. 1994) (noting distinction between holding and dictum).

The Hopis argue that the district court erred in "apparently equat[ing] 'use, occupation, or possession' with the term 'located' as used in the 1934 Act." What we, and the district court, must apply is precisely that Act. Congress in 1934 used the term, "located." This word was not a term of art connoting lands which people merely passed over occasionally or otherwise used to a very low level of intensity. The district court's construction was consistent with the ordinary meaning of the word. It was well designed to serve the purpose of the 1934 Act:

> Congress recognized Hopi concern over the 1882 reservation and their villages, shrines,

> and grazing areas outside the 1882 reservation. The "such other Indians" provision was explained to the Hopis as protecting their rights to areas occupied outside the 1882 reservation.

Masayesva, 619 F.2d at 808. We review the district court's construction of the statute *de novo*, *Jeldnesss v. Pearce*, 30 F.3d 1220, 1222 (9th Cir. 1994), and conclude that it was correct and a correct implementation of this court's mandate in *Sekaquaptewa*.

We reject the Hopis' argument that "located" must be construed to mean the same thing as "possession, occupation, or use" under decisions by the Indian Claims Commission and Court of Claims. *See* 25 U.S.C. §§ 70-70v (now omitted); 28 U.S.C. § 1505. *See generally* Felix S. Cohen, Handbook of Federal Indian Law 1662 (1982 ed.); William C. Canby, Jr., American Indian Law 228-31 (1st ed. 1981). The Indian Claims Commission was authorized, *inter alia*, to hear claims arising from the taking by the United States . . . of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant." 25 U.S.C. § 70a. This provision permitted compensation for the taking of land held pursuant to aboriginal title:

> Indian tribes that occupied and used the land to the exclusion of others (except for mere temporary excursions) had an interest denoted as a "right of occupancy." This right later came to be known as "original Indian title" or sometimes simply as "Indian title" or

> "aboriginal title." That title cannot be compromised by any other party except the federal government. [citation omitted] . . . A taking by the federal government of lands held by original Indian title does not give rise to any right of compensation under the Fifth Amendment. [citation omitted] In this respect original title is to be distinguished from "recognized title" . . . . A taking of original Indian title by the federal government may . . . provide the basis for a claim under the Indian Claims Commission Act of 1946.

Canby, *supra*, at 223-24. *See also* Cohen, *supra*, at 491-92 ("Of course, Congress can provide compensation for the taking of original Indian title [although it does not have to do so]. . . . The Indian Claims Commission Act was a congressional program of limited retrospective compensation for extinguishment of Indian title").

The line of cases on which the Hopis rely to construe the phrase "possession, occupation, or use" began twelve years after the 1934 Act was passed. Congress could not have meant to use a meaning not yet given to a phrase it did not use, when it wrote "located" into the 1934 statute. Moreover, the Hopis are not litigating their aboriginal title to these lands, but rather the recognized title conferred on them by the 1934 Act. The district court in an earlier decision took note of a previous determination that Hopi usage in these areas had been insufficient to establish aboriginal title under a less stringent standard than that in the 1934 Act. *Sekaquaptewa*, 448 F. Supp. at 1188 (citing *Hopi Tribe v. United States*, 31 Ind. Cl. Comm. 16 (1973); *Hopi Tribe v. United States*, 23 Ind. Cl. Comm. 277 (1970)). The land

described in a statute as subject to recognized title "may or may not have been part of the aboriginal territory of the tribe." Canby, *supra*, at 226. *See also* 42 C.J.S. Indians § 72(b) (1991) ("The nature and extent of the rights and title of Indians in a reservation do not depend on aboriginal possession, but are measured by the terms of the governing act . . . .").

The district court's findings of fact as to the nature, scope, and intensity of Hopi land use are reviewed for clear error. Fed. R. Civ. P. 52(a); *Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir.) (en banc), *cert. denied*, 114 S. Ct. 2125 (1994). Application of principles of law to facts are mixed questions of law and fact. Under *United States v. McConney*, 728 F.2d 1195, 1202-04 (9th Cir. 1994) (en banc), we review the district court's application of law to facts far clear error where it is "strictly factual," but *de novo* where application of law to fact requires "consideration of legal principles."

The district court made extensive findings about the extent of non-religious but traditional activities such as gathering plants, wood for construction and fires, materials for use in tools, and so forth. *Masayesva*, 793 F. Supp. at 1528-30. It decided that the Hopi use of the widespread areas in which these activities took place was not so regular or extensive as to amount to the Hopis having been "located" there. *Id.* The court found that many such places were used depending on where an individual happened to be travelling, were used less often than once a year, or otherwise were not particular areas regularly used. *Id.* The Hopis do not contest the district court's factual findings as to the nature, extent, intensity and duration of this traditional land usage. The district court findings regarding these areas were not clearly erroneous.

Appendix A

Because we have concluded that the district court correctly construed the statutory term "located," the Hopis' argument that the case should be remanded for application of a less intensive "occupied or used" standard is necessarily rejected. The Hopis make two arguments about location in 1934 that are not controlled by this determination: (1) the district court failed to apply the standard correctly to areas where their religious uses were located in 1934; (2) the findings on where they grazed in 1934 were clearly erroneous.

1. Religious locations.

The district court rejected the Hopi claims to religious locations.

> [T]he Hopi Tribe claims in the 1934 Reservation based on the eagle gathering activities, visiting shrines, and gathering of ceremonial plants and animals are not sufficient "occupation, use and possession" to establish a property interest for exclusive use or partition purposes.

Id. at 1528. The religious locations included places visited for religious rituals and marked with rock cairns, petroglyphs, or hidden depositories for offerings. The Hopis also had traditional areas where eagle feathers were gathered for ceremonial purposes and shrines within those areas. The court also rejected Hopi title to traditional areas for gathering fir boughs, wild tobacco, and animals for use in religious ceremonies.

The district court gave three reasons for this rejection. All three require "consideration of legal principles" and are not

"strictly factual," so we review *de novo*. *McConney*, 728 F.2d at 1202-04.

First, the district court held that a 1974 statute entitling tribes to Interior Department protection of religious access obviated any claim of title:

> Notwithstanding anything contained in this Act to the contrary, the Secretary shall make reasonable provision for the use of and right to access to identified religious shrines for the members of each tribe on the reservation of the other tribe where such use and access are for religious purposes.

25 U.S.C. § 640d-20. On the basis of this statute, the district court concluded:

> Given that access to religious shrines will be protected, the Hopi Tribe cannot persuasively argue that their presence gives the Hopi Tribe a property interest in the 1934 Reservation.

Masayesva, 793 F. Supp. at 1527.

We reject the district court's reasoning. The religious access statute was passed almost a half century after the 1934 Act. If the Hopis became entitled to property under the 1934 Act, they could not lose it because subsequent legislation added to their protection. The statute is not superfluous, even for shrines the Hopis own. For example, it protects each tribe's right to cross other tribes' land to reach its shrine, to decide who can go to the

shrines, to control maintenance, and to such other protections as may be necessary for appropriate religious use. This 1974 religious access statute cannot, however, have any bearing on whether the Hopis were "located" at a particular shrine in 1934. If they were, they are entitled to the shrine, regardless of the terms of the 1974 statute, and even if Congress were to repeal it.

Second, the district court held that allowing Hopi religious use to establish a property interest would contradict *Lyng v. Northwest Indian Cemetery Protective Ass'n,* 485 U.S. 439 (1988). While we agree with the district court that a religious use does not by itself create a property interest, the property interest in the Hopi religious shrines is created by the 1934 Act, not the religious use by itself. As we said in our previous decision, one of the purposes of the 1934 Act was to protect the Hopis' rights to "areas occupied outside the 1882 reservation" by "shrines." *Sekaquaptewa*, 619 F.2d at 808. *Lyng* and *Manybeads v. United States*, 730 F. Supp. 1515 (D. Ariz. 1989), were First Amendment cases; this is a property rights case. If the Hopis were "located," for a religious use, on certain land in 1934, then this was among the "pockets occupied" to which they obtained title under the 1934 Act.

Third, the district court held that the religious uses were not sufficiently intensive to satisfy the statutory "located" criterion. For example:

> Eagle gathering occurred only once a year, with only a small number of men involved. The Hopi Tribe failed to demonstrate that a substantial number of Hopis travelled to shrines outside the immediate vicinity of the Hopi villages in the 1930's, and many of the

> shrines are often only known to a small number of Hopis.

Id. at 1528. Because this conclusion was largely legal, depending on whether annual use or use by small numbers of people, sufficed, rather than "strictly factual," we review it *de novo*. *McConney*, 728 F.2d at 1202-04.

We cannot accept that once a year use is too infrequent for a tribe to be "located" at a religious site. Many religious observances take place only once a year, e.g., Yom Kippur, Christmas, Easter. Nor does use by only a few people, or people of only one sex, disqualify a religious site. Many religions require that access to a holy site be limited to a designated few people and to special times. In the Jewish religion, only one man, the high priest, could enter the holiest location, and he could do that only once a year. *See* Leviticus 16 (only Aaron could enter the sanctuary, and only on the tenth day of the seventh month, to make expiation for the sins of all Israelites). Many shrines, such as Mecca and the Western Wall, are holy to a religion, even though most of its adherents have never been there. Some holy sites, such as the Tomb of the Patriarchs in Hebron, are known only to a minority of adherents of the religion. Some religions, such as that of the Druse, are largely secret even from their own adherents who have not obtained a particular status within the religion. Some religions limit participation in certain rites to men, or to priests. The district court demanded a level of intensity of occupancy of Hopi holy sites which would be inconsistent with the practices of many religions.

We remand, so that the district court can award identifiable locations regularly and exclusively used for religious observances or activities by the Hopis to that tribe. Locations

that were regularly used by both Hopis and Navajos may be determined to be subject to partition "on the basis of fairness and equity." 25 U.S.C. § 640d-7(b). A religious shrine marked by a physical object or marking, such as rock cairns, petroglyphs, and hidden depositories for offerings, is an identifiable location. The district court must determine whether the eagle feather gathering and other religious hunting and gathering areas are sufficiently identifiable and subject to demarcation of boundaries so that the Hopis were "located" there in 1934.

We affirm the district court's conclusion that "the evidence . . . reflects that ceremonial plant gathering was sporadic and at irregular intervals" and usually occurred "around the vicinity [of] Moenkopi, off-reservation . . . or inside the 1882 reservation." *Masayesva*, 793 F. Supp. at 1528. Sporadic activity at irregular intervals over a general area not subject to precise demarcation is not a place where the Hopis were "located" in 1934.

Where the Hopis can show for 1934 (1) physical evidence of a shrine, such as a rock cairn or petroglyphs, or (2) regular (such as annual) religious use of a specific and identifiable area (as may be the case with eagle feather gathering), that is enough to show location. This does not imply that the Hopis are entitled to all of Hopitutskwa. The district court must use its discretion to allocate a reasonable amount of land around the shrine or regular use area to provide for its appropriate use and maintenance and reasonable access thereto.

2. Grazing

The Hopis argue that the district court erred in its findings of fact regarding the extent of the grazing area in which the Hopis

were "located" in 1934. This issue is purely factual, so we review for clear error. *Campbell*, 18 F 3d at 681. "[R]eview under the 'clearly erroneous' standard is significantly deferential, requiring a 'definite and firm conviction that a mistake has been committed.'" *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 113 S. Ct. 2264, 2280 (1993).

The district court made meticulous findings of fact, supported with detailed reference to the evidence, in its decision after the first phase of the trial to decide where the Hopis grazed their herds in 1934. *Masayesva*, 793 F. Supp. at 1509-26. At the end of the second phase of the case, deciding on a fair and equitable partition of the areas jointly occupied in 1934, the court refined its findings regarding 1934 occupancy. *Masayesva*, 816 F. Supp. at 1397-1401.

The Hopis suggest that the court incorrectly mixed together the question of where they were located in 1934, with what would be a fair and equitable partition based on modern-day location. The court stated that it was distinguishing the two questions:

> On April 27, 1992, this Court issued its Findings of Fact and Conclusions of Law regarding the Hopi interest in the 1934 Reservation. . . . The earlier Findings generally described the areas which the Hopis had exclusively or jointly used in 1934 based on evidence presented at the trial held between October 17, 1989 and February 8, 1990 (Phase I of this proceeding).

Appendix A

> This opinion will more specifically delineate the boundaries of the area which this Court found Hopis had exclusively used, and that area found to have been jointly used by the Hopis and Navajos in 1934. This Court will then partition the joint use area . . . .

Masayesva, 816 F. Supp. at 1394. While we might draw different inferences from some evidence than did the district court, we are unable to conclude, under the applicable standard of review, that the district court clearly erred.

The Hopis present a careful argument for why the evidence should have compelled a different conclusion on three geographic areas. On each, however, we conclude that the district court did not clearly err.

a. Ward Terrace

The district court initially found that "the Navajos and Hopis jointly grazed throughout the Ward Terrace area in 1934." *Masayesva*, 793 F. Supp. at 1517. The court subsequently amended its findings of fact to clarify what it meant by "Ward Terrace." The court decided that the Hopis had not shown that an area bounded by Ward Terrace on the east, Highway 89 to Cameron on the west, and the Little Colorado River on the southwest, had been used substantially, and so excluded it from the joint use area. *Id.* at 1534. The court also delimited the southern boundary of Hopi use in the Ward Terrace area. *Id.* at 1534-35.

The Hopis argue that the district court erred in concluding that "129-300 cattle could not have intensively used the entire

Ward Terrace" and that Hopi use was therefore not sufficiently substantial to constitute location. *Id.* at 1535, n.6. However, the district court explained in footnote 6 why it rejected the Hopi evidence. The court pointed to one witness' lack of specificity, the inconsistency of another witness' testimony, and the failure of proof of intensive, frequent use. The district court's findings as to Ward Terrace were not clearly erroneous.

b. Eastern Portions of Coal Mine Mesa and Moenkopi Plateau

The court found that Coal Mine Mesa was jointly used. *Id.* at 1524. As to Moenkopi Plateau, the court found that the evidence "clearly support[ed]" the Hopi claim of grazing on the western and northern portions of the Plateau. *Id.* at 1517. The court also found that portions of the central and southern Moenkopi Plateau were used exclusively by Hopis but that other portions were jointly used. *Id.* at 1521-22. Before the partition phase of the trial, the court delimited a southern boundary to the Moenkopi Plateau joint use area. *Id.* at 1535.

However, the court did not set precise boundaries to the Moenkopi Plateau and Coal Mine Mesa joint use areas until *after* the partition phase of the trial had ended. *Masayesva*, 816 F. Supp. at 1391401. The Hopis argue that the boundary finally set eliminated the possibility of a contiguous Hopi reservation by creating a Hopi no-use zone between the joint use area and the 1882 Hopi reservation. They contend that there was substantial evidence that Hopis did in fact graze in the no-use zone, up to and past the borders of the 1882 Hopi Reservation.

The district court did not commit clear error. The court concluded that one witness's testimony was not credible.

Masayesva, 793 F. Supp. at 1521, n.106; 1535, n.7. "[D]ue regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Fed. R. Civ. P. 52(a). Another witness's testimony was found not to be specific nor to establish the intensity of grazing. *Id.* at 1535, n.7. Our previous determination that the 1934 Act gave the Hopis "pockets" of land they occupied in the 1934 reservation implicitly rejects the proposition that the areas awarded to them need be contiguous to each other or the 1882 reservation. There is no clear error.

c. Area North of Moenkopi Wash, Including Pasture Canyon

The court initially found that "Pasture Canyon was jointly used by Hopis and Navajos in 1934." *Id.* at 1515. It subsequently restricted the joint use area to "Pasture Canyon south of the Government Pasture" and refused to include any land around the canyon floor. *Masayesva*, 816 F. Supp. at 1399. The court also found that "Hopis did not graze their livestock north of Moenkopi Wash (except in Pasture Canyon . . .)." *Masayesva*, 793 F. Supp. at 1526. However, the court later determined that "there was evidence of [two] Hopi sites *north* of Moenkopi Wash." *Masayesva*, 816 F. Supp. at 1399 (emphasis in original).

The Hopis claim that there was "substantial evidence" that Hopis grazed livestock north of Moenkopi Wash in 1934. They also dispute the district court's conclusion that there was no evidence of Hopi grazing outside of the floor of Pasture Canyon.

Again, the district court's findings are not clearly erroneous. The Hopis presented evidence of some use of this area, which the district court recognized. *Masayesva*, 793 F. Supp. at 1526,

n.127. The court found some of the testimony implausible or contradictory. There was no clear error.

B. Equitable Partition

The statute required the district court to partition lands in which the two tribes had a joint interest in 1934:

> Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation respectively.

25 U.S.C. § 640d-7(b). The district court partitioned about three quarters of the jointly held land to the Navajos, about one quarter to the Hopis. The Hopis argue that the partition should have been equal. The interpretation of 25 U.S.C. § 640d-7(b) is a question of law reviewed *de novo*. *Jeldness*, 30 F.3d at 1222. The district court's partition decision, based on "fairness and equity," is reviewed for abuse of discretion. *Sekaquaptewa v. MacDonald*, 575 F.2d 239, 244 (9th Cir. 1978).

We reject the argument that the partition had to be equal. The Hopis argue that at common law, when property held by tenants in common is partitioned, the shares are equal. The partition at issue was on the basis of a statute, not common law. We also reject the argument that because jointly held land in the Hopi reservation was partitioned equally, so must land in the Navajo reservation. Congress had rejected the "fair and equitable"

language for the Hopi Reservation partition which it adopted for the Navajo Reservation partition. *See Healing v. Jones*, 210 F. Supp. 125, 190-91 (D. Ariz. 1962). The subsequent statutory provision for dividing jointly held land in the Hopi reservation was different from the one for the Navajo Reservation. *See* 25 U.S.C. § 640d-5.

The Hopis argue that the district court gave the Navajos the benefit, in deciding upon a fair and equitable division, of areas the Navajos had settled in violation of the Bennett Freeze. (*See* Part II-E, *infra*). In principle, the Hopis are correct that it would not be "fair and equitable" to give the Navajos more land based on their own wrongdoing. "He who comes into equity must come with clean hands." Henry L. McClintock, *McClintock on Equity* 59 (1948). We are unable to conclude, however, that the district court awarded any more of the jointly held lands to the Navajos than it would have awarded absent the freeze violations that occurred, or that any of the award to the Navajos results from freeze violations. The district court concluded that "most of the Navajo sites [violating the Bennett Freeze] fall within the areas where Navajo families have been since before 1966 [the implementation date of the pre-statutory "Bennett Freeze"] . . . ." *Masayesva*, 816 F. Supp. at 1416. The district court would have given those areas to the Navajos even if the homesites had not been built. Only three new homesites, as opposed to improvements at preexisting homesites, violated the freeze, so the effect on the partition was *de minimis* in any event.

We agree with the district court that the statutory term "fairness and equity" does not mean that jointly held lands must be equally divided between the two tribes. The statute says the partition must be based on "fairness and equity," not equal division between the two tribes. Equality between tribes would

be capable of arithmetic precision, but "fairness and equity" is necessarily discretionary. Fairness and equity require that each tribe have its due, not that each have an equal share, and equal shares awarded to parties unequal in relevant respects would be unjust. *See* Aristotle, *Nicomachean Ethics*, Book V, Chapter 6. The district court considered five factors to determine a fair partition, four of which are principles justifying modification of an equal division:

> The partition line takes a number of factors into account, including (1) avoiding the relocation of individuals, (2) avoiding the disruption of grazing areas as much as possible, (3) providing 50% of the joint use area acreage to the Hopi Tribe, to the extent possible, (4) fairly and equitably distributing water sources, and (5) ensuring the feasibility of future administration of the partitioned areas including fencing.

Masayesva, 816 F. Supp. at 1418. Considering the broad discretion in the district court implied by the statutory phrase, "shall be partitioned by the District Court on the basis of fairness and equity," we cannot conclude that the use of any of these factors amounted to an abuse of discretion.

The district court said "the most important factor is avoiding the relocation of individuals." *Id.* It adjusted the partition so that "every Navajo homesite is located on land partitioned to the Navajo Nation" and "every Hopi home and ranch site is located on land partitioned to the Hopi Tribe." *Id.* While the statute does not compel this result, the district court had discretion so to adjust the division, so long as the adjustments did not otherwise cause the division to be inequitable.

The Hopis argue that the district court gave too much weight, in deciding where Navajos were located and should not be displaced, to seasonal locations.

> Many Navajos . . . live part-time in Tuba City (or other towns on the Reservation) and part-time (generally weekends and summers) at their homesites. This part-time use of the homesites is important to these people; often many generations have lived at these homesites (or sites close by within a customary use area), and their periodic return is necessary for conducting livestock operations. Thus, the Court will attempt, as much as is possible, to place full-time *and* part-time residences of Navajos on land partitioned to the Navajo Nation.

Id. at 1414 (emphasis in original). Consideration of this extent of use was not an abuse of discretion.

We are unable to conclude that the district court's partition of the joint use land as so unfair or inequitable as to amount to an abuse of discretion. We affirm.

C. Railroad Land

The district court did not make occupancy findings regarding certain lands which the Navajos obtained from the Santa Fe Railroad. Instead, it granted summary judgment for the Navajos, on the ground that this was not part of the vacant and unappropriated land which the 1934 Act apportioned to the Navajos and "such other Indians as may already be located

thereon." *Masayesva*, 792 F. Supp. at 1159. We review *de novo*, *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994) and affirm.

The United States conveyed the lands at issue to the Santa Fe Railroad in the 1860's. In 1904, Congress provided that railroads could exchange lands in Indian reservations for other lands of equal area and value in lieu of the reservation lands:

> Any private land over which an Indian reservation has been extended by Executive order, may be exchanged at the discretion of the Secretary of the Interior and at the expense of the owner thereof and under such rules and regulations as may be prescribed by the Secretary of the Interior, for vacant, nonmineral, nontimbered, surveyed public lands of equal area and value and situated in the same State or Territory.

43 U.S.C. 149.

The Santa Fe conveyed lands on what later became the Navajo Reservation in 1912, as part of such an anticipated exchange. The United States recorded Santa Fe's deed, but did not give Santa Fe "lieu lands" in return. This failure to complete the exchange may have resulted from a dispute about value of the lands to be exchanged. Santa Fe then conveyed other lands to the government, and the government conveyed lieu lands to the Santa Fe, in 1915.

The base lands conveyed by the Santa Fe in 1912 were not reconveyed by any instrument back to the Santa Fe.

Nevertheless, the Santa Fe sold them to the government again. Between 1929 and 1932, the Santa Fe conveyed them by quitclaim deed to the United States in trust for the Navajo Tribe. *Masayesva*, 792 F. Supp. at 1157. The United States used Navajo tribal funds to buy the lands. *Id.*

The Hopis argue that the United States already owned the railroad lands in 1912, so the quitclaim deeds in 1929-32 did not convey anything. The Navajos argue that the 1912 conveyance was rescinded by implication, when the United States refused to convey the lieu lands in exchange, so the land was acquired in trust for the Navajos in 1929-32, and was therefore not part of the unappropriated land subject to ownership by "such other Indians as may already be located thereon" under the 1934 Act.

It is plain from the fact of their purchase that the United States and the Navajos understood, in 1929-32, that the Santa Fe owned an interest in the lands. It is also plain, from the terms of the conveyance, that the Navajos and the United States intended, in 1929-32, that the lands should be held in trust for the Navajo Tribe. Had the United States been able to convey the lands into trust for the Navajos without paying the Santa Fe for quitclaim deeds, as it could if it owned the land, there is no reason to doubt that this would have been done.

There is law supporting the proposition that a conveyance in the circumstances of the Santa Fe's 1912 conveyance is subject to an equitable claim for rescission if the lieu lands are not conveyed. *State of Oregon v. Bureau of Land Management*, 876 F.2d 1419, 1427-28 (9th Cir. 1989); *Udall v. Battle Mountain Co.*, 385 F.2d 90, 94 (9th Cir. 1967). *Sumid v. Cairns*, 220 F. 1084, 1085 (Ariz. 1923).

Appendix A

> Since the relinquishment to the United States contemplated a completed exchange of lands, an equity in the nature of a right to rescission remained with the owner of the relinquished land until the exchange had been completed and it was not until then that the United States might be regarded as vested with unconditional ownership.

Battle Mountain, 385 F.2d at 94.

In the circumstances of this case, the Hopi argument would establish that the United States acquired bare legal title in 1912, subject to an equitable claim of rescission owned by the Santa Fe. The 1915 exchange is subject to two interpretations, either that it was an alternative to the failed 1912 exchange, or that it was a conveyance of Santa Fe lands in addition to those conveyed in 1912, bringing the value up to a level which satisfied the government. The purchase by the government in 1929-32 implies that the first interpretation is the one which the parties thought to be correct. The government did not obtain the equitable interest in the railroad lands until 1929-32. The Santa Fe did indeed own something when it conveyed its interest in 1929-32 by quitclaim deeds: the equitable right to the lands. The interest was then purchased with Navajo money and was subject to a trust on behalf of the Navajos. The district court correctly held that this land was not part of the unappropriated lands subject to the 1934 Act.

D. Boarding School Land

The district court found that in 1934, the government had managed a farm and pasture at the Tuba City Boarding School.

Masayesva, 793 F. Supp. at 1509. Hopi and Navajo children attended the school, and the Hopi Tribe contended that Hopis had worked on the land. *Id.* The district court concluded that Hopis were not "located" on the boarding school land for purposes of obtaining rights to property. *Id.* This is a legal rather than "strictly factual" question, so we review *de novo*, *McConney*, 728 F.2d at 1202-04, and affirm.

Navajo interests are the residue of all the land in the 1934 reservation except for the "pockets" of land on which the Hopis were located in 1934. *Sekaquaptewa*, 619 F.2d at 808. Attending or working at a boarding school is not the kind of settlement which Congress meant to protect in the statute. One does not obtain a property interest in land where one attends school or works as an employee, no matter how long one is there in these capacities.

E. Bennett Freeze

Congress provided in 1974, with immaterial exceptions, that no "lands in litigation" in the 1934 reservation should be developed except by written consent of each tribe:

> Any development of lands in litigation pursuant to [§ 640d-7] . . . shall be carried out only upon the written consent of each tribe, except for the limited area around the village of Moenkopi and around Tuba City . . . . "Development" as used herein shall mean any new construction or improvement to the property and further includes public work projects, power and water lines, public agency improvements, and associated rights-of-way.

25 U.S.C. §640d-9(f). This statute codified the freeze imposed in 1966 by Commissioner of Indian Affairs Robert Bennett. It reduced the incentive for either tribe to develop the jointly occupied lands between the time when the freeze was imposed, and the time when the court would partition jointly held lands based on "fairness and equity." Otherwise, either tribe, anticipating that a judge would want to avoid allocating land occupied by member of one tribe to the other, would have an incentive to manipulate the expected partition by creating occupancy during the litigation period.

The district court believed that as of 1992, when he concluded his determinations required by our remand in 1980, that the residents "have waited long enough to see this litigation resolved," and maintenance of the statutory freeze would be "inequitable," so he ordered the freeze "lifted." *Masayesva*, 816 F.Supp. at 1417. He then granted a limited stay pending appeal of this order, for land in the partitioned joint use area. *Id.* at 1441.

The Hopis argue that the district court lacked authority to lift the statutory freeze. We review *de novo, Jeldness*, 30 F.3d at 1222, and reverse.

The district court had no authority to lift the freeze. Congress wrote law which prohibited development of "lands in litigation" without written consent of both tribes. The litigation was not concluded when the district court entered judgment. The Hopis had a right to appeal which they exercised. The purpose of the statute implies that it operates during appeal, because appeal carries the possibility of remand.

Congress expressly gave the district court discretion to partition jointly occupied land according to "fairness and

equity." It did not confer comparable authority on the district court in the freeze provision.

The order lifting the freeze is vacated. The freeze remains in effect for the lands "in litigation." Those lands include, at the least, areas where the Hopis claim religious shrines and other religious occupancy. Whether other lands are 'in litigation" depends on whether a petition for certiorari is filed, and whether it is granted.

III. Conclusion

This dispute probably has its origins in the sweep of the Athabascan people from the north, at about the same time the Spaniards entered the Hopi lands from the south. It can never be ended in a way which satisfies both tribes. The Hopis may feel that they have been robbed of their holy land, Hopitutskwa, by the use of Navajo force combined with American law. The Navajos may feel that they have been deprived of lands which to which they should be entitled because of their much greater population. Congress decided that the dispute should be brought to an end by litigation, and exercised its power to provide for the standards which should be used. That process has largely been completed, except for the determinations which must be made pursuant to this decision where the Hopis were located in 1934 for religious purposes.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED JUNE 18, 1992

Vernon MASAYESVA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on Behalf of the HOPI INDIAN TRIBE, Plaintiff,

v.

Peterson ZAH, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on Behalf of the NAVAJO INDIAN TRIBE, Defendant,

v.

Evelyn JAMES, et al., Intervenors.

No. CIV 74-842 PCT EHC.

United States District Court,
D. Arizona.

April 27, 1992.

Order Amending Findings of
Fact June 18, 1992.

* * *

Appendix B

James E. Scarboro, Alfred T. McDonnell, Mary Gabrielle Sprague, David C. Warren, Arnold & Porter, Denver, Colo., W. Scott Bales, Lawrence A. Hammond, Meyer, Hendricks, Victor, Osborn & Maledon, Phoenix, Ariz., Michael P. O'Connell, General Counsel, Hopi Indian Tribe, Kykotsmovi, Ariz., for plaintiff.

Terry E. Fenzl, Craig Soland, John Rogers, Amy Gittler, Dolph Barnhouse, Peter Osetek, Brown & Bain, P.A., Phoenix, Ariz., for defendant.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
RE: HOPI CLAIMS

EARL H. CARROLL, District Judge.*

INTRODUCTION

I. *Parties*

Plaintiff Vernon Masayesva is the duly authorized Chairman of the Hopi Tribal Council of the Hopi Tribe, and appears herein as representative of the Hopi Tribe and its villages, clans and individual members.

Defendant Peterson Zah is the duly authorized Chairman of the Navajo Tribal Council and appears herein as representative

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* I take this opportunity to acknowledge the assistance of Kristen Rosati, my second year law clerk, in research and preparation of this order. She has also been able to devote substantial time towards pretrial issues and the Court's preparation for Phase II in this case.

of the Navajo Nation[1] and its chapters, clans, and individual members.

Evelyn James is the duly authorized spokesperson of the San Juan Southern Paiute Tribe and appears herein in her representative capacity on behalf of the San Juan Southern Paiute Tribe and its individual members.

II. *Background*

In 1974, the Hopi Tribal Chairman commenced this action pursuant to 25 U.S.C. § 640d-7[2] to determine Hopi rights and

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1. The Navajo Tribal Code, 1 N.T.C. § 301, requires officials of the Navajo Tribe to use the term "Navajo Nation" rather than "Navajo Tribe". Throughout this opinion, the Court will use the term employed by the Navajos.

2. § 640d-7. Determination of tribal rights and interest in land.

(a) Authorization to commence and defend actions in District Court

Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe, is each hereby authorized to commence or defend in the District Court an action against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934, except the reservation established by the Executive Order of December 16, 1882, for the purposes of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes.

(b) Allocation of land to respective reservations upon determination of interests

(Cont'd)

interests in the reservation created by the Act of June 14, 1934, 48 Stat. 960 (1934) (the "1934 Act"). The 1934 Act described the

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(Cont'd)

> **Lands, if any, in which the Navajo Tribe or Navajo individuals are determined by the District Court to have the exclusive interest shall continue to be a part of the Navajo Reservation. Lands, if any, in which the Hopi Tribe, including any Hopi village or clan thereof, or Hopi individuals are determined by the District Court to have the exclusive interest shall thereafter be a reservation for the Hopi Tribe. Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively.**
>
> **(c) Actions for accounting, fair value of grazing, and claims for damages to land; determination of recovery; defenses**
>
> **[Omitted].**
>
> **(d) Denial of Congressional interest in merits of conflicting claims; liability of United States**
>
> **[Omitted].**
>
> **(e) Payment of legal fees, court costs and other expenses**
>
> **[Omitted]**

external boundaries of the Navajo Reservation, and conveyed an equitable interest in certain of these lands to the Navajo Nation and "such other Indians as may already be located thereon."[3]

This lawsuit is the second action between the Navajo and Hopi Tribes to settle title in reservation lands in northeastern Arizona. The rights of the Navajo and Hopi Tribes in a parcel withdrawn by Executive Order on December 16, 1882 ("the 1882 Reservation") were previously litigated in a separate line of cases. *See Healing v. Jones*, 210 F.Supp. 125 (D.Ariz.1962), *aff'd*, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963); *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974). Supplementary proceedings still continue regarding the payment of "owelty" for differences in value of land received, damage to the land partitioned to the Hopi Tribe (the Hopi Partitioned Lands, or "HPL"), and prepartition "use" of the HPL by Navajos. Although the 1882 Reservation litigation is not relevant to the disposition of this lawsuit, the events of that dispute provide background understanding of the Navajo-Hopi land dispute, and may guide this Court in various ways in its decision.

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3. Section 1 of the 1934 Act provides:

> To define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes . . . the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: [legal description of land omitted]. All vacant, unreserved, and unappropriated public lands, . . . within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajos and such other Indians as may already be located thereon . . .

Appendix B

The present case has centered on who were "such other Indians" entitled to assert interests in the 1934 Reservation, which lands in the 1934 Reservation were subject to litigation, and where "such other Indians" were "located" in 1934; these Findings of Fact and Conclusions of Law will determine where "such other Indians" were located. Subsequent to these findings, the Court will conduct a trial regarding partition of the 1934 Reservation pursuant to § 640d-7(b) (Phase II).

III. *Who are "such other Indians"?*

The District Court previously held that the Hopi Indians were "such other Indians": "The Court takes judicial notice that a Hopi village existed at Moencopi on June 14,1934. Moencopi is within the 1934 Act land grant, and therefore, the Hopi are within the 'such other Indians' clause and are holders of equitable interests." *Sekaquaptewa v. MacDonald*, 448 F.Supp. 1183, 1193 (1978) (hereinafter, "*Sekaquaptewa I*"), *aff'd in part, rev'd in part, Sekaquaptewa v. MacDonald*, 619 F.2d 801 (hereinafter, *Sekaquaptewa II*"), *cert. denied*, 449 U.S. 1010, 101 S.Ct. 565, 66 L.Ed.2d 468 (1980).

The San Juan Southern Paiute Indians (the "Paiutes" or "Paiute Tribe") are also "such other Indians" and holders of equitable interests in the 1934 Reservation. In previous orders, this Court upheld the Department of Interior recognition of the Paiutes as an Indian tribe, and held that the Court had jurisdiction to determine their interests in the 1934 Reservation as "any other tribe of Indians", pursuant to 25 U.S.C. § 640d-7.[4]

These findings will address only the location of Hopi

4. This Court also held that 25 U.S.C. § 640d, *et seq.* did not authorize this Court to partition land to the Paiute Tribe.

Indians in 1934; separate findings will be issued regarding the location of the Paiutes in 1934.

IV. *Which lands are excluded from litigation?*

Certain lands within the boundaries of the 1934 Reservation were expressly exempted from the granting clause of Section 1 of the 1934 Act. These include the 1882 Reservation and certain lands previously reserved by Congress for water power purposes and power sites. Moreover, other lands had been permanently reserved by Congress prior to 1934, and were thus not in dispute, including lands reserved by the 1868 Treaty with the Navajo Nation, 15 Stat. 667 (located in the northeastern corner of the 1934 Reservation), and lands withdrawn by the Act of May 23,1930, 46 Stat. 378, and the Act of February 21,1931, 46 Stat. 1204 (both along the western edge of the 1934 Reservation).

Further, allotted lands for which patents issued were excluded from the scope of this litigation pursuant to § 640d-16(a).[5]

The Navajo Nation had argued that other lands were excluded from the scope of the litigation, as well. The 1934 Act conveyed an equitable interest to the Navajos and "such other Indians" on "*vacant, unreserved, and unappropriated public lands*". The Navajo Nation brought a number of motions for partial summary judgment asking this Court to find that certain lands within the boundaries of the 1934 Reservation were not

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5. § 640d-16(a) provides:

> [N]othing in this Act shall affect the title, possession, and enjoyment of lands heretofore allotted to Hopi and Navajo individuals for which patents have been issued.

"vacant, unreserved, and unappropriated", and thus not subject to the claims of the Hopi Indians. The Court held that some of these lands were "unreserved and unappropriated" and thus not subject to Hopi and Paiute claims, including lands purchased on behalf of the Navajo Nation, privately owned lands relinquished pursuant to Section 2 of the 1934 Act, and lands conveyed to the State of Arizona for the "support of the common schools" which were surveyed prior to withdrawal of the land pursuant to Executive Order. Further, the Court held that other lands were "reserved and appropriated" and subject to Hopi claims, including allotted lands for which patents did not issue and "school lands" which were unsurveyed or surveyed after withdrawal of the land pursuant to Executive Order. The location of these "excluded" lands has not been established; in Phase II of this litigation regarding partition, the parties will have the opportunity to present evidence regarding the location of these lands.

V. *What is sufficient occupation, possession, or use to create a property interest in the 1934 Reservation?*

The District Court previously held that the interests of the Hopi Tribe in the disputed lands were based on Hopi "occupation, possession, or use" in 1934, and that any Hopi interest was limited to an undivided one-half interest in these lands.[6] *Sekaquaptewa I*, 448 F.Supp. at 1193, 1196. Both parties appealed, and the Ninth Circuit reversed in part "only with

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6. In summary, the District Court also held: (1) the Hopi Tribal Chairman's representational capacity for the Tribe, villages, clans, and individual members of the Hopi Tribe was proper; (2) the Court had jurisdiction to partition the 1934 lands; (3) no accounting relief was statutorily authorized [prior to the 1980 amendments]; and (4) the previous action brought by the Hopi Tribe before the Indian Claims Commission had no collateral estoppel effect.

respect to the district court's holding that Hopi title is necessarily non-exclusive, even with respect to land that was actually and exclusively 'possessed, occupied, or used' in 1934." *Sekaquaptewa II*, 619 F.2d at 809-810 (1980).

The Ninth Circuit affirmed the District Court's interpretation of the 1934 Act that Hopi interest in the 1934 lands depended on Hopi occupation, possession, or use of the lands on June 14, 1934. The Court stated:

> The purposes, history, and language of the 1934 Act show an intent to withdraw all reservation land for the Navajos except for pockets occupied by Hopis. We agree with the district court that this is the meaning of the "such other Indians as may already be located thereon" provision. The legislative history discussed by the district court at 448 F.Supp. 1194-96, supports this conclusion.
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> * * *
>
> [L]egislative intent is clear enough to enable us to identify Hopi interests by areas settled. Navajo interests are identifiable as the residue. Congress recognized Hopi concern over the 1882 Reservation and their villages, shrines, and grazing areas outside the 1882 reservation. The "such other Indians" provision was explained to the Hopis as protecting their rights to areas occupied outside the 1882 reservation.

Appendix B

* * *

> The Act was not intended to disturb then-existing land tenure patterns .... [and] would not disturb the Hopis' right to occupy the land they were then occupying. This is consistent with the intent of the 1934 Act to preserve a *status quo* and not to disturb existing arrangements.

Sekaquaptewa II, 619 F.2d at 807-808.

While it is thus clear that Hopi land use in 1934 would be protected, the courts have not previously decided what types of land use, i.e. "occupation, possession, or use", were sufficient to create a property interest in the 1934 Reservation. The District Court did, however, clarify that "actual occupation" (presumably continual physical presence) was not necessary:

> [T]he Navajo attempt to limit Hopi rights and interest to land actually occupied by the Hopi is misplaced. The 1934 Act protects both Hopi occupancy and land use. For example, grazing land and religious shrines may fall within the scope of the land grant to the Hopi. These issues present a mixed question of law and fact, however, and the Court will not rule at this time on what types of land uses are sufficient to create a property interest under the 1934 Act. After discovery, the Court can determine which kinds of Hopi possession or use on June 14, 1934 were substantial enough

to create property rights within the area set aside by the boundary bill.

Sekaquaptewa I, 448 F.Supp. 1196.

The legislative history of the 1934 Act is sparse, and gives no guidance in determining what land use was substantial enough to create this property interest. A discussion of the legislative history is contained in *Sekaquaptewa I*, 448 F.Supp. at 1193-96 (the "only meaning this clause could plausibly be given in light of the legislative history is to protect the rights and interests of the Hopi tribe to the land they were using and occupying outside the 1882 Reservation on June 14, 1882").

The language and legislative history of the Navajo-Hopi Settlement Act, 25 U.S.C. § 640d-7, is similarly unhelpful. Although the legislative history is replete with discussion regarding whether a legislative or judicial solution to the 1934 Reservation dispute was appropriate,[7] there is no discussion or

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7. *See*, H.R.Rep. No. 92-1221, 92nd Cong., 2d Sess. 8 (1972) (proposed bill [the Steiger bill] would partition 208,600 acres adjacent to the 1882 Reservation to the Hopi Tribe); H.R.Rep. No. 93-909, 93rd Cong., 2d Sess 8-10, 24 (1974) (proposed bill [H.R. 10337] would partition 243,400 acres to the Hopi Tribe; letter from Morris Thompson, Commissioner of Indian Affairs, expressing concern regarding liability to the Navajo Tribe for a taking of Navajo land since no judicial determination of Navajo and Hopi interests in the 1934 Reservation had been conducted); S.Rep. No. 93-1177, 93rd Cong., 2d Sess. 20, 31-33 (expressed preference for immediate legislative resolution of 1934 lands, and proposed partitioning 243,400 acres of land to the Hopi land); 120 Cong.Rec. H6969-78 (1974); 120 Cong.Rec. S37538-546 (1974); 120 Cong. Rec. S37724-749 (1974) (Senate passes H.R. 10337, with Senator Montoya's amendment providing for a judicial resolution of the 1934 controversy); 120 Cong.Rec. H38758-762 (1974) (House concurred in Senate amendments).

reference to what type or intensity of land use would be sufficient to create a property interest.

The Hopi Tribe urges that the Court determine where Hopis were located with reference to their "traditional practices and modes of life", as interpreted by various Indian Claims Commission and Court of Claims cases adjudicating aboriginal title claims by Indian tribes. The words "use", "occupancy" and "possession" have acquired a special meaning in these cases. For instance, the extent of use and occupancy for aboriginal claims are "determined by [an Indian's tribe's] subsistence *and spiritual needs*", *Swinomish Tribe of Indians v. United States*, 26 Ind.Cl.Comm. 371, 383 (1971) (emphasis added), and include extended areas in which tribes have hunted and gathered plants. *Zuni Tribe of New Mexico v. United States*, 12 Cl.Ct 607, 608 (1987); *San Carlos Apache Tribe of Arizona v. United States*, 21 Ind.Cl.Comm. 189, 193 (1969). Significantly, some of these cases have found aboriginal title based on intermittent contact with the land. *United States v. Seminole Indians of the State of Florida*, 180 Ct.Cl. 375, 385 (1967); *Sac v. Fox Tribe of Indians v. United States*, 179 Ct.Cl. 8, 383 F.2d 991, 998 (Ct.Cl.), *cert. denied*, 389 U.S. 900, 88 S.Ct. 212, 19 L.Ed.2d 217 (1967); *Confederated Tribes of the Warm Springs Reservation of Oregon v. United States*, 177 Ct.Cl. 184, 194 (1966).

While understanding traditional practices is important to determine where Hopis were located in 1934, this Court will not apply the same standard regarding the *intensity* of "possession, occupancy and use" required to establish aboriginal title. The Hopi Tribe's claims in this case are based on *recognized title* granted by the 1934 Act. *Sekaquaptewa I*, 448 F.Supp. at 1187-89. Recognized title arises where Congress has acknowledged a right to permanently occupy and use land, and the subsequent

taking of that land is compensable. *Miami Tribe v. United States*, 146 Ct.Cl. 421, 175 F.Supp. 926, 936 (1959). In contrast, claims before the Indian Claims Commission are not based in law, but on Congress' policy decision to provide limited compensation to Indian Tribes for the extinguishment of nonrecognized Indian title. *See*, Felix Cohen, *Handbook of Federal Indian Law*, 1982 ed., p. 492. Intermittent and non-intensive use is not sufficient to establish recognized title.

In fact, the Hopi Tribe's aboriginal claims to approximately three-quarters of the 1934 Reservation were previously adjudicated by the Indian Claims Commission; the Commission held that Hopi aboriginal claims were extinguished by the passage of the 1882 Executive Order withdrawing lands for the Hopi. *Hopi Tribe v. United States*, 31 Ind.Cl.Comm. 16 (1973); *Hopi Tribe v. United States*, 23 Ind.Cl.Comm. 277 (1970). The Hopi Tribe may not have a second chance at establishing its claims of aboriginal use to much of the 1934 Reservation.

At the other end of the spectrum, the Navajo Nation urges the Court to adopt a "plain meaning" interpretation of the word "located", and require the Hopi Tribe to demonstrate a "physical presence or existence in a place", or "settlement". Although the Court previously rejected the Navajo attempt to limit Hopi rights and interests to land actually occupied by the Hopi, *Sekaquaptewa I*, 448 F.Supp. 1196, the Navajo Nation now extends their argument to include "those particular parcels that Hopis used regularly for residence or used regularly and intensively for subsistence purposes".

The Court finds that the use by Hopi Indians must be substantial and sufficiently intensive in order to create a property interest in the 1934 Reservation, though the use does not have to

be for subsistence purposes. Use by a few isolated individuals, especially when away from traditional use areas of that individual's Tribe, and irregular or sporadic uses are not sufficient. However, since seasonal use is pervasive in Indian land use patterns, and indeed, necessary in the harsh environment of the 1934 Reservation, substantial seasonal use is sufficient for this Court to find occupation or use of the land.

After the areas on which Hopi Indians are located are identified, "Navajo interests are identifiable as the residue." *Sekaquaptewa II*, 619 F.2d at 808. Thus, this Court need only address Navajo use of lands on which the Hopi Tribe has proved Hopis were "located" in 1934, in order to decide whether Hopis were "exclusively" or "jointly" located on that land. If Hopis were exclusively located on an area of land it will become a part of the Hopi Reservation. If both Navajos and Hopis made use of an area, the area is subject to partition between the Tribes based on "fairness and equity".

VI. *Hopi claims of exclusive use area based on documentary evidence*

Before discussing the evidence presented at trial, the Court will address Hopi claims of an exclusive use area based on documentary evidence and aerial photographs. The Hopi Tribe claims that an 80,000 acre area depicted in Ex. 703A (with the modifications described in Hopi Proposed Finding 57) was used, occupied, and possessed by Hopis in 1934 "to the virtual exclusion of others".

The Hopis argue that certain United States government officials and members of the Navajo Nation "informally acknowledged" that the Hopis intensively used this area "or an

approximately similar area" in the 1920's and 1930's. *See* 4 TT 546-65 (Dr. Godfrey). The Hopi Tribe cites Ex. 237 (Letter from C.L. Walker, Superintendent Western Navajo Indian Agency, to H.J. Hagerman, Special Commissioner of Indian Affairs, dated February 5, 1930), describing an informal agreement reached to prevent disputes between Navajo and Hopi stockmen; the Hopis were to graze out of Moenkopi Wash[8] "as far as their stock would naturally graze from the Village" and the western edge of "the mesa" was agreed to be the western boundary. However, this letter does not explicitly state what the boundaries were and the letter notes the boundaries were not always observed by members of either Tribe. The letter does not support the conclusion that this entire area was exclusively used by Hopis.

Second, Hopi expert Ronald Wright analyzed United States Soil Conservation Service ("SCS") aerial photographs taken in 1934 (the "Fairchild aerial photographs" or "aerial photographs") for cultural features or disturbances such as fields, corrals, structures, or trails. The Hopi Tribe contends that all of these cultural features were examined on the ground by Hopi expert Dr. Charles Adams, and that *all* of these cultural features were Hopi, as supported by physical evidence and testimony.

However, Dr. Adams did not express an opinion regarding whether Hopi use of the area was *exclusive*. Dr. Adams admitted that he did not seek out Navajo sites in the area and that Mr. Hamana (a Hopi tribal employee assisting Dr. Adams) and Dr. Fritz (an anthropologist assisting Dr. Adams) did not take him to examine sites they suspected were Navajo. 8 TT 1215 (Dr. Adams). Further, Hopi counsel stated in closing:

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8. The Hopis use the spelling "Moenkopi"; some government documents and previous court decisions utilized the spelling "Moencopi".

Appendix B

> I would like to say a word on the issue of a Hopi exclusive use area. The Court may have noticed that nowhere in the Hopi Tribe trial memorandum or its opening statement, was a claim made for a particular exclusive use area, nor did Dr. Adams in his testimony make such a claim.
>
> The most Dr. Adams could do was to describe Hopi use, based upon archeological remains, but he was not in a position, nor is the Hopi Tribe, to state that there was no Navajo or Paiute use of areas at some distance from the Village.

14 TT 2113 (Mr. Scarboro).

Neither the document cited nor the aerial photographs conclusively establish that this 80,000 acre area was exclusively Hopi, and the Court will therefore examine the evidence presented at trial regarding Hopi and Navajo use of the 1934 Reservation. The location of residences, farming, grazing, and other traditional uses will be evaluated.

FINDINGS OF FACT

I. *Residence*

The Hopi have for centuries lived in villages located on First, Second, and Third Mesas within the 1882 Reservation. Additionally, in 1934 about 400 Hopis lived within the borders of the 1934 Reservation at the Village of Moenkopi. The Hopi Tribe also claims that Hopis had seasonal field and ranch houses

outside of Moenkopi in 1934 in the areas of Moenkopi Wash, Ward Terrace, the Moenkopi Plateau, the Bakalo, the Little Bakalo, Coal Mine Mesa other miscellaneous areas.

Because Dr. Adams indicated that Hopi residences away from the villages were usually associated with fields or corrals located at a distance from the main village,[9] Hopi residences will be discussed with reference to Hopi farming and grazing outside of Moenkopi.

The Court will note that a few Hopis resided in Tuba City in 1934: three or four employees of the Indian Service stayed in federal employee housing,[10] and the Hopi Tribe contends that some Hopi children attended boarding school in Tuba City. However, public employment and school attendance are not activities that are sufficient to create a property interest in these areas.

II. *Farming*

The Hopi Tribe claims that Hopis farmed in seven areas in 1934: Moenkopi Wash/Kerley Valley, Reservoir Canyon, Pasture Canyon, the Moenkopi Plateau, the Bakalo, Coal Mine Mesa, and the government-administered farm. Any Navajo farming in these areas will also be addressed.

1. Moenkopi Wash/Kerley Valley

Hopis farmed throughout the Moenkopi Wash/Kerley

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9. Ex. 651, p. 71 (Adams report).

10. 6 TT at 1031 (Deposition of J. Humetewa); 6 TT at 937-940 (Numkena).

Valley in 1934. For ease of discussion, the Wash area will be divided into five sub-areas.

a. *Moenkopi Wash, upstream from the present Highway 264 bridge*

The Hopi Tribe first contends that there were four Hopi fields in 1934 along Moenkopi Wash upstream from the present Highway 264 bridge, for about three miles. (Quad 71, plots 20, 21, 30, and Adams' Site 12) Hopi lay[11] and expert[12] testimony

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11. William Numkena testified that all of the cultivated plots in this area were farmed in 1934 by Hopis, and that no Navajos farmed in the area. Plot 30 was farmed by his uncle, Edwin Kaye. 6 TT 948, 9634 (Numkena),

Ira Naseyouma testified at deposition that the farms along the wash east of the bridge were farmed by Hopis: one by a man named Kyarsyawma, who began farming in 1930 or 1931; another owned by Dan Tuuyongwa, whose son-in-law Mark Kyarskwaptiwa was farming in 1934; a farm east of Tuuyongwa's was owned by Alex Humetewa, and worked in either 1934 or 1935 by Howard Lomatywa'yma; another plot was farmed in 1934 by Jackson Tuutsawina and his brother, Joseph Dallas; another was owned by Edwin Kaye (aka "Edwin Kuwanheptiwa") and worked by his son William Kaye; and the last plot was cultivated by Palmer Pongyangoytiwa, Guy Naseyouma's father-in-law. Ex. 736, p. 50-60 (Deposition of I. Naseyouma). *See also*, 11 TT 1798-1800 (Deposition of G. Naseyouma).

The Court will note at the outset that the spelling of Hopi and Navajo names may not be correct. While the Court has made an effort to be consistent in the spelling, government documents, expert reports, and other exhibits sometimes contained varied spellings of names, and these inconsistencies may have been carried over to this opinion.

12. Various studies of the United States Soil Conservation Service ("SCS") will be utilized in determining where Hopis and Navajos were farming (Cont'd)

supports this contention. Although the Navajo Nation argues that government documents establish that these fields were not in cultivation in 1936,[13] the testimony of the Hopi witnesses was

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(and grazing) in 1934. From about 1934 to 1940, the SCS conducted a systematic study of the resources, terrain, people, and livestock of the Navajo and Hopi Reservations, which will be utilized in these Findings. *See* Ex. 2590, Navajo District Annual Report, 1936-1937 at 57-67 (describing studies); Ex. 2653, Navajo District Annual Report 1937-1938 at 55-60 (studies and surveys completed included Agronomy, Engineering, Soils, Range Management, Woodland Management, and Wildlife Management, and socio-economic data).

Hopi expert Dr. Anthony Godfrey testified that SCS documents, including the 1936 LMU3 Agronomy Report, noted four Hopi dry farms in this area (plots 10, 20, 21, and 30). 4 TT 516-18 (Dr. Godfrey); Ex. 657, p. 73 (Godfrey report) (plots 20, 21, and 30 listed as belonging to Hopis Burton Kaye, Ray Tewa, and Edwin Kaye). Another Hopi expert, Dr. Charles Adams, testified that rock art associated with plot 30 (Site 151), had the initials "EK" and "MT", which he believed were for Edwin Kaye and Milo Tewa with the date 1923. Dr. Adams also testified that Site 152, the easternmost field in the area, existed in 1934 because it was visible in the 1934 Fairchild aerial photographs, and interviews with Hopis established that Henry and Robert Dallas, Phillip Polingyamptewa, and Palmer Accowsie were using the field "circa 1934". 7 TT 1136-38 (Dr. Adams); Ex. 651, p. 85 (Adams report).

Further, Hopi residences were found in the area. *See*, Ex. 651, App. I, Site 80 and 81 (Adams report).

13. 1936 Navajo Service Land Management Survey, Unit-3, Agronomy Branch Report, at p. 203516, 203524, and 203527 ("LMU3 Agronomy Report"), Ex. 408, lists most of these fields as idle (excepting 1/2 acre of plot 30 as an apple orchard.) Further, Adams Site 152 did not appear in the LMU3 Agronomy Report or the 1937 LMU3 Base Map, which the Navajo Nation argues indicates that it did not exist in 1934. However, there is no way to tell from the LMU3 Agronomy Report how long those fields had been idle. 5 TT 643 (Dr. Godfrey).

uncontradicted that the fields were cultivated in 1934.[14] The Navajo Nation did not present any evidence of Navajos farming in this area.

The Court finds that Quad 71, plots 20, 21, 30, and Adams Site 152 were farmed by Hopis in 1934, and that no Navajos farmed in this area.

b. *Moenkopi Wash, downstream from the present Highway 64 bridge to the Government Farm*

The Hopi Tribe claims that Hopis farmed all the cultivatable land in this area (including Quad 71, plots 11, 12, 12.1, 12.2, 12.3, 12.4, 12.5, 12.6, 12.7, 12.8, 12.11 and 12.13), except for a few acres within Navajo allotted lands which were farmed by Navajos. The Hopi Tribe introduced testimony that this area was farmed by Hopis, although the testimony was not referenced by plot number.[15] Numerous

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14. The Navajo Nation claims that Ira and Guy Naseyouma's testimony and Dr. Adams' report were somewhat inconsistent regarding the distance of these fields from Moenkopi and the size of the plots. *See*, 11 TT at 1798 (Deposition of G. Naseyouma), Ex. 736 at 57-58 (Deposition of I. Naseyouma), and Ex. 703A, Ex. 661.93. However, this difference was not material regarding whether Hopis were farming in this area in 1934.

15. Roger Honahni testified that his father grew corn in Moenkopi Wash. 3 TT 312 (Deposition of R. Honahni).

Alton Honahni testified that his grandfather, Mike Lomatywa'yma, farmed three fields around Moenkopi, one of which was northeast from Moenkopi. 13 TT 2037-2041 (Deposition of A. Honahni).

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government documents also confirm Hopi farming in this area.[16]

The Navajo Nation agrees that Hopis farmed Quad 71 plots 11, 12.0, 12.5 (the northern half), 12.8 (the southern portion), and 12.11 (the eastern half). However, the Navajo Nation contends that all other plots are allotted tracts, and excluded from the determination of Hopi interests. The Navajo Nation has admitted that any Navajo farming in this area is on allotted land, which is excluded from litigation. The exact location of the allotments will be determined in the partition proceedings.

The Court therefore finds that this area, excepting Navajo patented allotments which are excluded from litigation, was farmed exclusively by Hopis.

c. *Southside of Moenkopi Wash between Moenkopi Village and the "old Hopi bridge" at the western end of Kerley Valley*

The Hopi Tribe claims that there were numerous Hopi fields

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William Numkena testified at trial that most of the area down to the government farm was farmed by Hopis, but that Navajos farmed part of the area. 6 TT 948-49, 958-59 (Numkena).

16. These documents include the LMU3 Agronomy Report (Ex. 408), the S.C.S. Human Dependency Schedules (Ex. 16, S.C.S.H.D.S. #248, 4/9/37 (Sam Numkena farmed plot 12.3); Ex. 18, Schedule #256, 4/4/37 (Ernest K. Moore farmed plots 12.8B and 12.11A); Ex. 19, Schedule #259, 4/15/37 (Frank Nuhtayma farmed plot 12.6); Ex. 20, Schedule #255, 4/14/37 (Mark Quashura farmed plot 12.5B); Ex. 21, Schedule #250, 4/19/37 (Roger Honahni farmed plot 12.13); Ex. 22, Schedule #258, 4/19/37 (John Talashoyiwma farmed plot 12.6); and the "Lomavitu list" of Hopi field plots at Moenkopi in April, 1937 (Ex. 493A).

in this area (Quad 71, plots 13 and 14; Quad 19, plots 3, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, 3.8), and that no Navajos farmed on the south side of Moenkopi Wash.[17]

The Navajo Nation agrees that Hopis farmed plots 13 and 14 in Quad 71, but argues that most of the area in these plots was located on allotted land. As discussed previously, the exact location of the allotments will be determined in the partition proceedings. That land not located on allotments was farmed exclusively by Hopis.

As to the remaining plots, there was substantial testimony that Hopis farmed extensively in this area.[18] This testimony was not contradicted by the Navajo Nation.

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17. William Numkena testified that no Navajos farmed on the south side of Moenkopi Wash in the 1930's. 6 TT 949-951, 30 TT 4189 (Numkena). Guy Naseyouma testified that in 1934, some Navajos were farming on the kwiningyak (northwest) side of the wash. Ex. 740, p. 346-347 (Deposition of G. Naseyouma).

18. William Numkena testified at trial that his father farmed plot 3.1. 6 TT 949-951, 30 TT 4189 (Numkena).

Guy Naseyouma testified at deposition that he farmed an approximately 10 acre-field with his father-in-law on the taatoq (southeast) side of the wash. 11 TT 180002 (Deposition of G. Naseyouma). Ex. 740, p. 195-197 (Deposition of G. Naseyouma).

Ira Naseyouma testified at deposition that a number of Hopis farmed south of the wash, including Talasvuyawma (who shared his farm with Lomatywa'yma), Gilbert Kawwtsi, Sam Numkena, Kopolvu, Frank Siyamtiwa (who shared his plot with Ted Honyamtiwa), his uncle Pavonyawma (who

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Appendix B

The Navajo Nation does claim that Navajos farmed south of the wash, however, including Joe Willie (Camp 297)[19], Elvin Nez (Camp 276), and Louise Skacy (Camp 168).[20] The Court finds

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shared the plot with Jackson Hoosava), Elmer Tuwaventiwa, Sam Sami and his son Melvin Tiwa, Nasitoyniwa, his son-in-law Gilbert Honsuru, his son Ray Nasitoyniwa, Palmer Pongyangoytiwa (who worked his field with the help of Ira and Guy Naseyouma), Charlie Talawipi and his son Irvin Charlie and son-in-law Walter Albert, Jackson Tuutsawina and his son, Ralph Jackson, Joseph Dallas, Ray Tuutsawina, Guy Naseyouma, who worked the field with Ira, and Tuveyestiwa (who worked the plot with Charlie Talawipi).

See also, 4 TT 505-07 (Dr. Godfrey); Ex. 657, pp. 64-72 (Godfrey report) (1936 LMU3 Agronomy Report listed Hopis as farming on plots 3.0, 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, and most of 3.8).

19. A Navajo "camp" is not a residential location, but a group of individuals who reside in close proximity to one another. Because Navajos are "matrilocal", meaning that a married man goes to live with his wife's family, Navajo camps frequently consist of an older couple, their married daughters and sons-in-law, and the unmarried children of each. 15 TT 2285-90 (Dr. Russell).

20. The area of contention is labelled area "I" on Attachment 1 to the Hopi response to the Navajo Proposed Findings (and as plot 3.8 on Ex. 726), and as areas "B" and "C" on Attachment 1 to the Navajo response to the Hopi Tribe's Proposed Findings (plot 42, 62, 63, and 85 on Ex. 3571).

The parties dispute which is the correct map to use to depict farming in Kerley Valley. The Hopi Tribe has attached a 1937 United States Geological Survey (USGS) map drawn by Page and Lomavitu from 1934 aerial photography to identify farming locations (Ex. 726). The Navajo Nation argues that the 1947 Base Map, Exs. 2856 and 3571, is more accurate and depicts man-made features not on the USGS map to assist in identifying the farming locations, and that Ex. 726 is not drawn to scale. The Hopi Tribe argues that Ex.

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that none of these camps farmed south of the wash in 1934,[21] and that this area south of the wash was farmed exclusively by Hopis.

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2856/3571 is not representative of Kerley Valley in 1934 since the map was made in 1947, and omits important areas near Moenkopi Village. As the Court is not identifying specific locations of farms or allotments at this stage, the map used is not essential. Since the maps use different plot numbering systems, the Court will attempt to designate the plot numbers on each map, or will refer to general areas of disagreement.

21. Dr. Scott Russell, the Navajo expert, concluded that plots 42 and 85 were farmed by Camp 297, the family of Joe Willie. Although the residence area of Camp 297 (Site 3-20) was located north of the wash (see Ex. 3571), Dr. Russell was taken to both fields south of the wash by Joe Willie. 19 TT 2743-46 (Dr. Russell). Plot 85 (area "L" on Hopi Attachment 1) was treated as "empty" on Ex. 493A, the Lomavitu list of field plots, and none of the S.C.S. maps indicate this area was cultivated. *See* Ex. 726, 3258, 3246.

Dr. Russell was taken to Plot 63 by descendants of Elvin Nez, who was a member of Camp 276 in 1934. 19 TT 2743-46 (Dr. Russell). Richard Butler (of Camp 297), who was 26 years old in 1934, spent his summers in Kerley Valley and testified that Elvin Nez farmed south of the wash. 25 TT 3622 (Butler). However, the 1937 Human Dependency Schedule # 87 lists Nez as farming north of the wash (quad 19, field no. 1). Ex. 754.

Dr. Russell further testified that Louise Skacy (Camp 168) had a house south of the wash, associated with several corrals and a sweat lodge. 18 TT 2630 (Dr. Russell) (Site 3-19). Several descendants of Skacy and Joe Willie informed Dr. Russell that Skacy farmed this plot in 1934. 19 TT 2746-47 (Dr. Russell). Richard Butler also testified that Skacy farmed south of the wash. 25 TT 3622 (Butler). The Hopi Tribe argues that there is insufficient evidence that the Skacy family lived south of the wash. William Numkena testified that John Skacy resided only on the north side of the wash in 1934, which matches the location of Site 3-19A. Moreover, the house was not visible in the 1934 aerial photographs.

Further, the 1936 LMU3 Agronomy Report, Ex. 3169, lists only Hopi farmers south of the wash.

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d. *North of Moenkopi Wash and south of the old Tuba City-Cameron Road, between the Government Farm on the east and the old Hopi bridge on the west*

Both parties agree that Hopis and Navajos farmed in Quad 19, though disagree where each farmed. The area in dispute is labelled "A" through "M" on Hopi Attachment 1 to its response to the Navajo Proposed Findings.

First, the parties do agree on the use of a few areas. The Navajo Nation concedes that Hopis farmed in areas "E" and "H".[22] Further, the Hopi Tribe concedes that Navajos were farming areas "A", "B", "F", "G", "J", and "M" (plots 1.1, 1.8A, and 1.9 on the SCS maps).

Much of area "C" is in dispute: both Tribes contend they used plots 1.8B, 1.8C, and 1.8D. However, no witness was able to accurately estimate the location of the various farms or estimate acreage used by either Tribe,[23] and the Court finds that this area was jointly used.

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22. Dr. Godfrey testified that Hopis were farming approximately 30 acres within plot 1.7 (area "E"), 5 TT 728-29 (Dr. Godfrey); William Numkena testified that both Hopis and Navajos farmed in plot 1.7, including Nehoitewa, Nasenumptewa, John Skacy, and Mark Twain. 6 TT 954 (Numkena). The Navajo Nation did not contradict the testimony of Alton Honahni that area "H" was used by Alex Humetewa in 1934.

23. William Numkena testified that Gaseoma and a man named "Big Burton" farmed in plot 1.8. 6 TT 953 (Numkena).

Ira Naseyouma testified at deposition that a Navajo named Skacy, George Nuvayestiwa, Nasinomtiwa, Lomatywa'yma, Burton Qoyangyamtiwa, (Cont'd)

Appendix B

Further, the parties dispute whether areas "D" and "K" were used by Navajos; although the Hopi Tribe does not claim that

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Talasvuyawma, Roger Qoyaheptiwa, Jim Siwiheptiwa, Sam Sami (Tuwangoytiwa), Siletstiwa, and Kyarsyawma had farms west of the government farm. 9 TT 1457-71 (Deposition of I. Naseyouma).

Guy Naseyouma testified at deposition that there were many farms on the kwiningyak (northwest) side of the wash. He confirmed that a few Navajos worked fields immediately west of the government farm, and that west of that, Hopis including Tuwanomtiwa, Nasinomtiwa, Qoyangyamtiwa, Qoyaheptiwa, Lomatywa'yma, Sileptiwa, Siletstiwa, Tiwa, Humihongiwa, Kyarsyawma, worked fields almost to the old bridge. 11 TT 1804-0541 (Deposition of G. Naseyouma); Ex. 740, 20206, 211-212, 346-350 (Deposition of G. Naseyouma).

Alton Honahni testified that his grandfather, Lomatywa'yma, farmed west of the Kerley Trading Post (within plot 1.7), and that Jimmy Siwiheptiwa, George Nuvaystiwa, John Nasinomtiwa, Talasvuyawma, Roger Qoyangyamtiwa, and Burton Qoyangyamtiwa owned farms to the east of his grandfather. Alex Siwiheptiwa, Frank Siyamtiwa, Tumosi, Honyamtiwa, Kopolvu, Gaseoma, Pavonyawma, and one Navajo had farms west of his grandfather. 13 TT 2042-51 (Deposition of A. Honahni).

James Humetewa testified at deposition that about 10 Hopis were farming in the wash southwest of the trading post in 1934. Ex. 732, p. 175 (Deposition of J. Humetewa).

See also, 4 TT 507-09 (Dr. Godfrey); Ex. 657, p. 55-70 (Godfrey report).

The Navajo Nation contends that a large portion of this area was farmed by Navajos. 19 TT 2750-58 (Dr. Russell) (Richard Butler (Camp 297), Joe Begay (Camp 185), Navajo Posey (Camp 67), and Hosteen Yazzie (aka John Sullivan) and Sam Tohannie Spencer (Camp 58) farmed this area).

Hopis farmed in these areas, a Hopi witness testified that they were uncultivated and covered by greasewood in 1934,[24] and there is no documentation of Navajo use. The Court finds that areas "D" and "K" were uncultivated in 1934.

The Court finds that the area north of Moenkopi Wash and south of the old Tuba City-Cameron Road, between the Government Farm on the east and the old Hopi bridge on the west, was jointly used by Navajos and Hopis in 1934.

e. *Kerley Valley, north of the old Tuba City-Cameron Road*

The Hopi Tribe claims that Hopis farmed just west of Kerley's Trading Post in Quad 19, plot 1.6 and 1.8.[25] The Navajo Nation contends that plot 1.6 was not under cultivation in 1934, and that a Navajo farmed plot 1.8. Also, the Navajo Nation contends that Navajos farmed plots 1.10, 1.5 and 1.4 (which the Hopis contest), but the Hopi Tribe concedes that Navajos farmed Plots 1.6e and 1.9.

The Hopi Tribe introduced substantial testimony that Hopis farmed plot 1.6 in 1934.[26] Further, the evidence

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24. 13 TT 2048-49 (Deposition of A. Honahni).

25. This plot 1.8 is farther north than the one discussed in the previous section. It is unknown why two plots were numbered the same.

26. William Numkena testified that his uncle Lewis Numkena, Harold Sileptiwa, and Harold Tewatewa farmed plot 1.6 just west of Kerley's Trading Post. He did not recall if Navajos also farmed this area. 6 TT 955-56, 4192 (Numkena). Although on cross William Numkena stated that he was not certain when the plot was under cultivation, 6 TT 987 (Numkena), when he was recalled

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indicates that plots 1.8, 1.4, 1.5, and 1.10 were farmed by Navajos.[27]

Due to the established presence of both Navajo and Hopi farms in this area, the court finds that the area was used jointly.

2. Reservoir Canyon, south of the reservoirs and northeast of Moenkopi Village

The Hopi Tribe claims that Hopis farmed Quad 71, plots 19,

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to the stand, he testified that he remembered working on plot 1.6 in 1934, throughout the mid-30's. 30 TT 4192-93 (Numkena). He also testified that Lewis Numkena and a Navajo Boyd Tisi farmed a place called "Little Phoenix" in back of Kerley's Trading Post, a canyon above the rest of plot 1.6. 6 TT 949, 957 (Numkena).

Although the 1936 SCS map depicting the locations of fields north of the road depicts this field as uncultivated, (see Ex. 3232, LMU3 map p. 5681), Ex. 408 at p. 203495, indicates plots 1.6 and 1.8 were under cultivation, the Lomavitu lists a Hopi owner for plot 1.6 (*see* Ex. 493A), and the 1934 aerial photographs show the field as a cultivated area. Ex. 712, Attachment 4.

27. William Numkena testified that this plot was occupied, though not farmed, by a Navajo. 6 TT 952 (Numkena). The Agronomy Reports reference to a Hopi-owned plot 1.8 is more likely to the plot 1.8 located south of the road, discussed in a previous section. Ex. 408, p. 203495, Ex. 3169, TC16944. The Hopi Tribe did not introduce any other evidence that plot 1.8 was farmed by Hopis.

Dr. Russell testified that these fields were farmed by Navajos, based on information from his informants, 19 TT 2757, 2761 (Dr. Russell), and Dr. Godfrey admitted that these sites were probably Navajo fields. 4 TT 504 (Dr. Godfrey).

28, and 29, and that no Navajos farmed in this area.[28] The Navajo Nation does not contest this assertion. The Court finds that Reservoir Canyon is a Hopi exclusive use area.

3. Pasture Canyon, north of the reservoirs and south of the Government Pasture

The Hopi Tribe contends that Hopis farmed quad 71, plots 14, 15, and 16.[29] The Navajo Nation agrees that Hopis farmed 18 acres in Pasture Canyon.[30]

Although the Navajo Nation does not contend that Navajos farmed in this area, the Navajo Nation contends that Navajos used this area for other grazing. Grazing will be addressed later in this order. The Court finds that only Hopis used Pasture Canyon for farming.

4. Moenkopi Plateau

The Hopi Tribe contends that Hopis farmed at Quad 71, plots 1, 10, and 22 on the central Moenkopi Plateau above "Owl's Cap". The Navajo Nation disputes that these plots were farmed

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28. LMU3 Agronomy Report, Ex. 3169, TC16973 and TC16976; Ex. 408, p. 203524, 203527 (Hopis farmed 10 acres in plot 19, 10 acres in plot 28, and 2 acres in plot 29).

29. Dr. Adams opined that dated rock art at Sites 100, 102, 122 and 159 established that Hopis were farming in Pasture Canyon in 1934. Ex. 651, pp. 77-78, 86-87.

30. LMU3 Agronomy Report, Ex. 3169 at TC16971; Ex. 408 at 203522 (plot 14 (1 acre), plot 15 (7 acres), plot 16 (10 acres).

in 1934, since the LMU3 Agronomy Report indicated that these plots were idle by 1936.[31] However, the Hopi Tribe introduced substantial testimony that these plots were being farmed in 1934.[32]

The Hopi Tribe also argues that no Navajos farmed on the Moenkopi Plateau. However, the Navajo Nation has introduced sufficient evidence that Navajos farmed Quad 70, plots 1 and 2.[33] This area is located south of the Hopi claimed exclusive use area. The Navajo Nation also claims this area was used extensively for other uses, such as grazing, which will be addressed in a later section of this order.

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31. Ex. 3169 at TC16962, 965, 974; Ex. 408, at 203513.

32. Roger Honahni testified at deposition that Edwin Kaye and Jackson "T" [Tewa] farmed an area identified by the Hopi Tribe as plot 1 in 1934, 3 TT 430-431, Ex. 722g (Deposition of R. Honahni), and that Burton Kaye and Gail Burton farmed another field identified as plot 22. 3 TT 433; Ex. 722g (Deposition of R. Honahni). Further, William Numkena testified that Jackson Tewa farmed plot 1 in the mid-1930's. 6 TT 968 (Numkena). Alton Honahni testified that his grandfather Fred Honahni had a field west of Posiwlelena, southeast of the Village of Moenkopi. 13 TT 2053-2055 (Deposition of A. Honahni). *See also*, 4 TT 516-21 (Dr. Godfrey); Ex. 657, p. 130 (Godfrey report); 7 TT 1134-35 (Dr. Adams) (Site 131); Ex. 651, p. 88 (Adams report).

33. Dr. Russell testified that plot 1, just north of Goldtooth Ranch, belonged to Goldtooth, and field 2, just south of Goldtooth, was farmed by Adolph Heavy, Frank Goldtooth's father-in-law. 19 TT 2790 (Dr. Russell). This was confirmed by Lena Goldtooth Canyon. 24 TT 3435-37, 3446-49 (Canyon). This testimony was not contradicted by the Hopi Tribe. Further, the LMU3 Agronomy Report listed Goldtooth as the owner of field 1 (though listed the field as idle). Ex. 3169, TC16961.

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The Court finds that the central Moenkopi Plateau above Owl's Cap was farmed exclusively by Hopis, and that the southern Moenkopi Plateau, south of the Hopi claimed exclusive use area, was farmed exclusively by Navajos.

5. The Bakalo, or Hollow Place

The Hopi Tribe argues that Hopis farmed Quad 71, plots 2, 6, 7, 8, 9, and 24. Although the Navajo Nation concedes that plot 2 (35 acres), plot 8 (1 acre), and plot 9 (1 acre) were Hopi farms, it argues that plots 6 and 7 and some of plot 2 were shown as idle in the 1936 LMU3 Agronomy Report, indicating that these fields were not in cultivation in 1934.[34] However, the Hopi Tribe introduced sufficient testimony to conclude that all of these plots were under cultivation.[35] This testimony was corroborated by

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34. Ex. 3169 at TC16962-64.

35. Roger Honahni testified at deposition that his father had a field in 1934 in the Bakalo, and that other Hopis had fields in the area, including Clay Johnson, Gaseoma, Edward Holmes, Milo Tewa, Forrest Kaye, Sonny Dallas, Jackson Tewa, Edwin Kaye, Burton Kaye, Henry Dallas, Robert Dallas, Stephen Dallas, Nasitoyniwa, and Bryan Gilbert. 3 TT 295-99; 424-30 (Deposition of R. Honahni).

William Numkena testified at trial that Clay Johnson and Gaseoma farmed plot 2 in the mid-1930's, Rowland, Roger, and Stanley Honahni, George Nuvayestiwa, and Edwin and Forrest Kaye farmed plot 6, Milo Tewa farmed plot 7, Roy Tewa farmed plot 8, and an unknown Hopi farmed plot 9. 6 TT 966-67 (Numkena).

Ira Naseyouma testified at deposition that Clay Johnson had a fenced-in farm at "Paqlo" (the Bakalo) south of Moenkopi, about 10 miles southwest of

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expert findings.[36] The existence of these fields was revealed in the 1934 aerial photographs.

The Navajo Nation also argues that plot 24 was farmed by a Navajo named Tohannie. The LMU3 Agronomy Report lists him as the owner of this plot,[37] and Dr. Godfrey testified that he did not know who farmed this plot in 1934.[38] However, the Hopi Tribe argues that plot 24 was farmed by Tom Holmes and his three sons, Willard and Ernest Holmes and Edward Honeyestewa (Adams Site 136), and that other testimony indicated that the

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the new highway, in 1934. "Old Kyarsyawma", Milo Tewa, Sikyaleetsiwma and his son Roger Honahni, and Honahni's son Steven Dallas, and Siletstiwa also had fields in the area. Ex. 736, pp. 127-53 (Deposition of I. Naseyouma).

Alton Honahni testified at deposition that his grandfather Fred Honahni had a field at the Bakalo, and that quite a few Hopis farmed in the same area. 13 TT 2054-55 (Deposition of A. Honahni).

36. Dr. Godfrey's report states that the LMU3 Agronomy Report documents Hopi dry farming in the Coal Mine Mesa/Bakalo area, as does Gordon Page's 1939 Human Dependency Study. Ex. 657, pp. 126-35 (Godfrey report). *See also* Ex. 651, p. 87 (Adams Report) (the LMU3 Agronomy Report identified Clay Johnson and Gaseoma as farming plot 2 (Adams Site 21), Roger and Roland Honahni, Forrest Kaye, George Nuvayestiwa, and Milo Tewa were identified as users of plot 6 (Adams Site 135). Site 88 was used by Milo Tewa and Site 136 was used by the Holmes family.

37. Ex. 3169 at TC16974,

38. 4 TT 521 (Dr. Godfrey).

listing of "Tohannie" as the owner of this plot must have been a mistake.[39]

The Court finds that the Bakalo (Hollow Place) was exclusively farmed by the Hopis.

6. Coal Mine Mesa

The Hopi Tribe contends that Hopis farmed Quad 71, plots 3, 4, 5, and 31, and that no Navajos farmed in this area.[40]

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39. James and Fannie Tsinnie, Mr. Tohannie's son-in-law and daughter who were members of his camp, never told Dr. Russell that Tohannie had farmed in the Bakalo. 22 TT 3138-44 (Dr. Russell). Also, Alton Honahni and Lena Canyon testified that no Navajos farmed in the Bakalo. 13 TT 2055-56 (Deposition of A. Honahni): 24 TT 3470 (Canyon). *See also*, Ex. 651 p. 87 (Adams Report) (no informant had knowledge of Tohannie using plot 24).

40. William Numkena testified that Earl Numkena and his uncle Nasitoyniwa farmed in this area in the mid-1930's; Brian Gilbert and Nasitoyniwa were farming plots 2 or 3, George Navayestewa and Forrest Kaye farmed plot 5, and Jackson Tewa farmed in the area around plot 31, though he did not know specifically who farmed plot 31. Numkena did not know who farmed plot 4. He did not see any Navajo farmers on Coal Mine Mesa in the mid-1930's. 6 TT 949-69 (Numkena).

Roger Honahni testified at deposition that Jackson, Harold and Roy "T" farmed south of Porskwi in 1934. 3 TT at 431 (Deposition of R. Honahni). The LMU3 Agronomy Report identifies field 31 as cultivated by Jackson Tewa and Harold Tsavatewa.

Ira Naseyouma testified at deposition that Harold Tuutsawina owned a farm about two or three miles "from charcoal" in 1934. Ex. 736, p. 149 (Deposition of I. Naseyouma). This testimony was not specific enough to locate a field.

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Although the Navajo Nation agrees that Hopis farmed 9-acres in plot 31 in the southern portion of Coal Mine Mesa,[41] the Navajo Nation claims that the other plots were no longer under cultivation in 1934. Dr. Adams testified that the Hopis he interviewed indicated that the Nanmuru area became too dry in the late 1920's and that the fields were not in use in 1934.[42] Also, Gordon Page's 1939 Human Dependency Study found tract nos. 3, 4, and 5 to be idle. The Court finds that only field 31 was under cultivation in 1934.

The Navajo Nation admits that no Navajos farmed in this area, though it contends Navajos grazed livestock in this area. Other uses will be addressed in a later section.

The Court finds that only Hopis farmed on Coal Mine Mesa in 1934, as indicated above.

7. Government-administered Farm Land

In 1934, the Indian Service administered two tracts of land by Moenkopi/Tuba City for the benefit of the Tuba City Boarding School, which was attended by Navajo and Hopi children. The Hopi Tribe contends that Hopis worked on the "Government Farm" depicted on Ex. 707, Attachment 1 and Ex. 3571, and the "Government Pasture" in Pasture Canyon, depicted on Ex. 707, Attachment 2. The Hopi Tribe also contends that after 1934 these lands were relinquished to individual Navajo and Hopi farmers.

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41. *See* Ex. 3169 at TC1697.7; Adams Site 95.

42. 4 TT at 1134, 1248-49, 1256 (Dr. Adams); Ex. 651, p. 88 (Adams report).

Appendix B

Public employment on government lands is not sufficient to establish that the Hopi Tribe had a property interest in this land in 1934. In fact, Hopi witnesses testified that in 1934, no Hopis used the government land.[43]

III. *Grazing*

The Hopi Tribe claims an interest in 1.25 million acres of land it argues was used by Hopi livestock in 1934. Hopi grazing practices were traditionally influenced by cultural and religious practices: the distances Hopis would go from the village to tend their livestock or for other purposes was in general limited by the preference of the Hopis to return to their village before dark every evening. However, the establishment of herding cooperatives, where one member would remain with the livestock overnight rather than returning to the village, allowed herding sites farther from the village.

The Hopi Tribe contends that Hopis tended to herd sheep and goats within a 15-mile radius from the villages. The Hopis claim that outlying corrals, water sources, camps and ranch houses support the claims of more distant sheep ranges utilized by sheep cooperatives, and that sheep were typically herded from 2-6 miles from these corrals.[44]

The Navajo Nation argues the Hopi Tribe overestimates the distance that sheep would graze from the village, and instead asserts that sheep grazed in a 2-4 mile radius around each corral,

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43. 3 TT 467 (Deposition of R. Honahni); Ex. 740 at 362 (Deposition of G. Naseyouma).

44. 10 TT 1503-04, 1528, 1564 (Dr. McCawley).

all of which were within a couple of miles from the village.[45] The Court will examine the evidence regarding the existence of Hopi sheep corrals and/or field houses to determine how far the Hopis grazed sheep from the village.

The Hopi generally permitted cattle to graze freely over the unfenced range in search of forage and water. Cattle were permitted to wander unsupervised, although they were occasionally driven back toward the village and were rounded up once a year.[46] The existence of cattle cooperatives allowed some Hopis more active management of cattle. Horses were either kept close to the villages, or were allowed to graze with the cattle.

In 1937, the SCS determined that Hopis residing at Moenkopi owned 893 sheep and goats, 403 cattle and 106 horses, for a total of about 3,000 sheep units.[47] Earlier studies showed a lower sheep unit count.[48] Although the number of animals will

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45. Ex. 224 p. 3 (Report of Chester E. Faris, District Superintendent to Commissioner of Indian Affairs, 5/12/28), 7 TT 1101 (Dr. Adams) (Hopi sheepherders went back to the village at night); 2 TT 276 (Nasevaema) (brought Naseyawma's sheep back to the village each night).

46. Ex. 224, p. 3 (Report of Chester E. Faris); Ex. 464 pp. 5-7 (Page, *Hopi Range Use*, 1938); 4 TT 525-26 (Dr. Godfrey) (cattle "were not herded, and especially not in the winter time [when they were] left to fend for themselves literally out on the range"; "[n]ormally there was one roundup a year, usually in the early summer"); 10 TT 1504 (Dr. McCawley) ("Hopis have very loose management of . . . their cattle . . . During the winter, the cattle were allowed to drift and to seek out forage and water as they chose").

47. Ex. 451, Page, *Stock Ownership-Moencopi Village*, 4/15/37 at 3.

48. Ex. 2239 at 2, Letter from Walker to Hagerman, 11/20/30 (2,800 sheep units); Ex. 3193, 1936 Dipping Records (884 Hopi sheep and goats).

not determine the amount of land used, it is indicative of the intensity of grazing by Hopis.[49] The SCS also found that Hopi livestock shared a range of about 70,000 acres with Navajo livestock.[50]

There are inadequacies in the SCS information in determining grazing patterns in 1934, partly due to the fact that most of the SCS studies were conducted after 1934: the SCS studied range conditions in 1936-1937, and did not study livestock and range use until 1937-1940.[51] Further, the original 1936-1937 LMU3 data on Hopi livestock holdings and the LMU3 Human Dependency Survey Schedules have been lost and were not available for trial.[52] Although the Hopi Tribe contends that range use patterns, water sources, and livestock

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49. The Hopi Tribe contests these statistics for Hopi livestock ownership, arguing that Moenkopi Hopis owned between 2,400 and 5,000 sheep units in 1934. However, this encompasses the SCS estimate of 3,000 sheep units.

The Hopi Tribe provides alternative statistics: Dr. Godfrey reported that Moenkopi Hopis owned 495 cattle in the late 1930's, based on a review of all SCS documents. Ex. 656, p. 181-182 (Godfrey report). In 1925, a roundup of cattle in the Western Navajo jurisdiction indicated that Hopis owned 850 cattle. 4 TT 544 (Dr. Godfrey); Ex. 656, p. 167-168 (Godfrey report). In 1930, William Zeh reported that Moenkopi Hopis owned 3000 sheep and 800 cattle. Ex. 268, p. 25.

50. Ex. 451, Page, *Moencopi Village Stock Operators and Range*, 4/15/37.

51. 10 TT 1499 (Dr. McCawley).

52. 16 TT 2356 (Dr. Russell).

numbers had changed significantly since 1934,[53] the Hopi Tribe admits there is no direct evidence that Hopi livestock was reduced in the government's livestock reduction program after 1934. Unless reliable evidence contradicts the information provided in the SCS studies, such as forceful testimony regarding use in 1934, the Court will accept the findings of the SCS.

The Navajo Nation argues that the maps introduced by the Hopi Tribe to demonstrate the Hopi grazing areas do not reflect the intensity of livestock use in the area, and thus are not a fair representation of Hopi use. Further, Dr. Godfrey added an extra ten miles beyond points mentioned in historical accounts to estimate grazing areas, and admitted the maps were only "general" and did not represent *actual* grazing areas.[54] Dr. Ainsworth also admitted his map depicted only a general area.[55] Further, the Navajo Nation contends that Dr. McCawley's estimates of grazing areas are not accurate because he did not take into account competing Navajo livestock, did not evaluate water and forage around Moenkopi, and did not estimate frequency of use.[56]

The Court will not adopt the maps of the Hopi experts as actual representations of Hopi grazing areas in 1934, but as visual representations of the expert opinions. The Court will examine the testimonial, archeological, and documentary

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53. Ex. 656, p. 187-93 (Godfrey report).

54. 4 TT 536-537, 5 TT 787 (Dr. Godfrey).

55. 12 TT 1892, 2008 (Dr. Ainsworth).

56. 10 TT 1510-11, 1521-23, 1558-59, 1570 (Dr. McCawley).

Appendix B

evidence regarding Hopi grazing east of the 1882 Reservation, south of the 1882 Reservation, and west of the 1882 Reservation in several areas, including Pasture Canyon, Ward Terrace, the western and northern Moenkopi Plateau, the southern and central Moenkopi Plateau, the Bakalo (or Hollow Place), the Little Bakalo, Coal Mine Mesa, Moenkopi Wash/Kerley Valley, and other areas north of Moenkopi Wash.

A. *East of the 1882 Reservation*

The Hopi Tribe contends that Hopis from First Mesa used about 130,000 acres in this area, citing various historical documents in support of the assertion.[57] However, none of these

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57. The first, a letter from Oliver LaFarge to Dr. Eahref Shevky of the U.S. Conservation Service, dated September 24, 1936, states, "Kyakotsmovi cattle is run as far down as the Leupp Jurisdiction boundary"; "This line embraces territory now grazed by the Tewas. At the . . . [illegible] . . . graze beyond it, clear to the well S of the Black Mountain Store". Ex. 416. The Navajo Nation contends that LaFarge's reference to "Black Mountain Store" might have been regarding the trading post at Pinon, located on Black Mesa (sometimes called "Black Mountain"), within the 1882 Reservation, and that the Leupp Jurisdiction boundary is the 1882 Reservation southern boundary. 20 TT 2905-08 (Dr. Russell). This was not contradicted by the Hopi Tribe. In any event, LaFarge does not disclose the source of his information, nor indicate how many cattle were seen.

In 1938, Gordon Page reported that Albert Naha and George Lomayesva "ranged stock from Red Lake on the south to Low Mountain on the north, and from the Hopi Buttes on the west to Cow Springs in the northeast", and that Ross Macaya and Roger Tuvavantewa run "the largest outfit made up of cattle of the Third Mesa group. Their range extends down the north bank of Oraibi Wash as far as Blue Lakes; however, their stock drifts on south as far as the Sand Springs Trading Post." Ex. 464, p. 3 ("Report on Hopi Range Use"). The Navajo Nation

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documents establish that Hopis grazed east of the 1882 Reservation. In fact, SCS investigations in the mid-1930's found no significant use by Hopi livestock for LMUs 10 and 17, which extend over the area east of the 1882 Reservation.[58] Moreover, two Navajos who lived along the eastern boundary testified that

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contends that Page's report does not establish any Hopi use east of the 1882 Reservation: Cow Springs is just outside the 1882 Reservation border, and there is no indication of frequency of use. Dr. Godfrey admitted that the other locations mentioned in this letter were all within the 1882 Reservation boundaries. 5 TT 791, 794 (Dr. Godfrey).

A letter from G.A. Trotter, Acting Superintendent, to Commissioner of Indian Affairs, dated March 9, 1938, reported that Hopi stockmen were using Districts 5, 3, 4, and 7. Ex. 473. However, there was no discussion of extent of use or numbers of stock, and part of LMUs 3, 4, 5 and 7 are within the 1882 Reservation, and there is no indication of more precise grazing areas.

A memorandum from Gordon B. Page to J. Nixon Madley, dated October 7, 1938 discussed Hopi grazing outside of District 6. Ex. 480. Again, however, there is no indication that there was grazing outside the 1882 Reservation. Dr. Godfrey admitted that all locations mentioned are within the 1882 Reservation. 7 TT 794-95 (Dr. Godfrey).

58. Ex. 3461, LMU10 Human Dependency Survey. *See also*, 20 TT 2908 (Dr. Russell) (report does not make reference to Hopis living in LMU10); Ex. 3476, LMU10 1937 Livestock Census (only Navajos are listed as permittees for LMU10); 20 TT 2912 (Russell) (same); Ex. 3488, LMU17 Human Dependency Survey (total Navajo population of 3,841; does not mention Hopi population); Ex. 3506, LMI17 1937 Livestock Census (only Navajo permittees listed); 20 TT 2929 (Russell) (same); Ex. 3482, LMU17 1936 Land Planning Report (refers to total Navajo population of LMU17; no mention of Hopis).

they did not see Hopis herding east of the 1882 Reservation in the 1930's.[59]

Because the Hopi Tribe failed to introduce any testimony corroborating Hopi grazing east of the 1882 Reservation boundaries, and government documents do not establish that Hopis grazed east of the border, the Court finds that the Hopi Tribe was not "located" east of the 1882 Reservation in 1934.

B. *South of the 1882 Reservation*

The Hopi Tribe contends that Hopis from First, Second, and Third Mesas used a range of 425,000 acres south of the 1882 Reservation, when Hopi cattle grazed south along the drainages to lower elevations in the winter. Further, the Hopi Tribe claims that First Mesa Hopis grazed horses in the Hopi Buttes area around Cedar Springs year-round.

The Hopi Tribe again offers various historical documents in support of this claim. These documents do not prove that Hopi cattle grazed south of the 1882 Reservation.[60]

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59. Sam Billy testified that there was no Hopi grazing around Pete Springs ("Beeshbito Springs"), 27 TT 3850-51 (Billy), and Francis D. Tsosie testified that no Hopis brought livestock to the well at Cottonwood School, just east of the 1882 border between LMU4 and LMU10, and he did not see Hopi livestock in that area. 28 TT 3961-62 (Tsosie).

60. Exs. 416, 464, 473, and 480 were addressed in the previous section. Ex. 464's reference to a range extending "down the north bank of Oraibi Wash as far as Blue Lakes . . . and south as far as the Sand Springs Trading Post" refer to locations within the 1882 Reservation boundaries, as conceded by Dr. Godfrey. As to a reference that "in some cases" Hopi cattle "drift[ed] south" "as far as

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Appendix B

The Hopi Tribe also introduced the deposition of Reuben Lomayesva, who described his family's herding in the area

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Tolani Lakes", Dr. Godfrey admitted that this did not say that Hopi cattle went farther south than Tolani Lakes, which straddles the southern border. 5 TT 787 (Dr. Godfrey). Further, Gordon Page testified at deposition that the cattle tended to stop at Tolani Lake because the availability of water; he did not see any Hopi cattle grazing south of the 1882 border. Ex. 3579 at 46-47 (Deposition of Page).

The Hopi Tribe also introduced Ex. 493, the Hopi Land Management Unit Hopi-Navajo Boundary Report, Report of the Human Dependence Survey, by Gordon B. Page, dated December, 1939. However, Dr. Godfrey conceded that the locations listed were within the 1882 Reservation boundaries. 5 TT 800, 810-811 (Dr. Godfrey) (Tovar Mesa, Jeddito Valley, Naha Wells, Little Star, Wide Top Butte, and White Cone).

Ex. 501, "Hopi Agricultural Notes", by Gordon B. Page dated May 4, 1940, refers to Hopis ranging down Oraibi Wash as far as Blue Lakes and south to Sand Springs Trading Post; these locations were within the 1882 Reservation boundaries. 5 TT 791, 794 (Dr. Godfrey) (conceding).

The Hopi limitation within 1882 Reservation boundaries was confirmed by Page's 1938 report on Hopi range use: "Stockmen from First Mesa run cattle down the Jeddito Wash in L.M.U. No. 7 parallel *to the present boundary*." Ex. 464 at 4 (emphasis added). Further, the LMU7 Planning Report, Ex. 3359, p. 63, stated, "[p]ractically all of the Hopis that are found in Unit No. 7 are located along Jeddito Wash" in sub-Unit No. 2, along the southern boundary of the 1882 Reservation.

Ex. 3319, the LMU5 Dipping Record 1937, dated 2/15/38, shows that several Hopis dipped livestock in LMU5, but does not state where in Unit 5 Hopis grazed or were dipped. Ex. 3372, the LMU7 Livestock Count from 1937 Dipping Records does not identify the ownership of livestock.

around the southern border.[61] However, his family lived at Shonto Springs seven miles north of the border, and he personally never went south of the 1882 Reservation boundary, so his testimony was not based on firsthand knowledge.[62] Further, the Hopi expert testimony, largely based on the documents cited earlier, did not establish by a preponderance of

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61. Reuben Lomayesva testified his grandfather George Lomayesva and the family herded around Echo Canyon, northeast of Keams Canyon, at Shonto Springs (Masiipa) within District 6, and from Masiipa to the Little Colorado River. The family would allow their cattle to roam, and they would scatter in the winter along Hooypai, down toward Matovi (northwest from Tovar Mesa, southeast of Shonto, close to the 1882 Reservation line), down Polacca Wash toward Red Lake and Payutomo (Newberry Mesa) to the Little Colorado River and Grand Falls, and to Bird Spring 15 miles east of Leupp. He further testified that in the summer of 1934, there were other Hopi outfits operating around Shonto, including Scott Qotsmasa, Ralph Hootiwa, Alfred Puhuyesva, Roger Qotshaytiwa, Tukekwaptiwa, Ross Maqaya, Jacob Coin and Herbert Hamana, Saahu, going progressively northwest. In 1934-1935, when the family took cattle to the railroad for sale, they would corral cattle at a place called Sunshine, northwest from Meteor Crater (12-15 miles south of Leupp).

The family also had 25-30 horses which were allowed to freely roam and were rounded up once a year. The horses would graze in Hopi Buttes, east and west of the road from Winslow to Musangnuvi, 10 miles in a northeasterly direction from Dilkon, toward Indian Wells, but did not go as far as the road from Keams Canyon to Holbrook (Highway 77). Other horses went in a southeast direction from Dilkon or in the southwest direction toward Winslow. Further, the family and other Hopis had about 60 mares grazing around a butte named Sustavangtukwai, eight miles northeast of Isvatukwi, six miles south of Piitukwi. 11 TT 1719-52 (Deposition of Lomayesva). This testimony does not establish that the horses grazed south of the 1882 Reservation border, since the Hopi Buttes straddle the southern border of the 1882 Reservation.

62. 11 TT 1773-74 (Deposition of R. Lomayesva).

the evidence that grazing occurred south of the 1882 Reservation.[63] Moreover, Navajo testimony contradicted the Hopi claim that Hopi livestock was grazing south of the 1882 Reservation.[64]

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63. Dr. Godfrey testified that the summer range was within the 1882 Reservation area, but that SCS reports indicate that cattle drifted south to lower elevations in the winter. 4 TT 529-30 (Dr. Godfrey). As discussed, these reports do not establish that grazing took place south of the 1882 Reservation. Although Dr. Godfrey testified that 1882 Reservation cattle would have grazed south to the Colorado River, which was a "natural boundary", he did not establish that this grazing actually took place in 1934. 4 TT 534 (Dr. Godfrey). Dr. Godfrey stated,

> Well, I don't think I've drawn a boundary. I've tried to represent on the map some fluid uses at this time. The lines that I've drawn are to indicate vicinities. I will be the first one to admit that they may be overinclusive, and they may also be underinclusive. The documentation talks about vicinities. And a line has to be drawn somewhere.

4 TT 536-37 (Dr. Godfrey). The Court has no basis on which to accept Dr. Godfrey's estimate of grazing areas, which may be overinclusive.

Dr. McCawley's testimony was similarly based on government documents which do not establish that Hopi livestock grazed south of the 1882 Reservation in 1934. He testified that cattle would have grazed down along the [Little] Colorado River and to the southern portions of the Hopi Buttes, due to forage availability and lack of artificial boundaries, not on information that the grazing in these areas actually occurred in 1934. 10 TT 1525-47 (Dr. McCawley) (area surrounding confluences of Oraibi, Polacca, and Jeddito Washes was a "documented use area"). Dr. McCawley did not make efforts to corroborate the information in the documents on which he relied. 10 TT 1553 Dr. McCawley).

64. Gene Price, a Navajo herding south of the 1882 Reservation in 1934 in (Cont'd)

Appendix B

The Court concludes that Hopi livestock did not graze south of the 1882 Reservation in 1934.

C. *West of the 1882 Reservation*: The Hopi Tribe contends that Moenkopi Hopis used about 700,000 acres west of the 1882 Reservation for grazing. The Tribe claims that Hopis herded on the Kaibito Plateau north of the Moenkopi Wash, on the northern ends of Moenkopi Plateau, Coal Mine Mesa, and south of Moenkopi Wash throughout the rest of the area, including Ward Terrace. The Hopi Tribe also contends that cattle owned by Third Mesa Hopis grazed west of the 1882 Reservation, in the southern part of the area.

The Navajo Nation, in general, argues that the area of use is greatly exaggerated, since the Moenkopi Hopis had approximately 3,000 sheep units of livestock, which would have allocated over 230 acres per Hopi sheep unit, "a preposterous assertion in view of the intensive use of the area by Navajos." Also, the Navajo Nation argues that use of such an extensive area would have been sporadic and irregular, and that cattle were permitted to drift unsupervised.

The Court will examine both Hopi and Navajo grazing in nine areas: Pasture Canyon, Ward Terrace, western and northern Moenkopi Plateau, southern and central Moenkopi Plateau, the Bakalo (or Hollow Place), the Little Bakalo, Coal Mine Mesa, Moenkopi Wash/Kerley Valley, and areas north of Moenkopi Wash.

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LMU5, testified that he did not see any Hopi livestock from Tovar Mesa to Tolani Lakes. 27 TT 3864-66 (Price). Jack Clark, a Navajo herding in LMU7 in the mid-1930's, testified that he did not see any Hopi livestock while herding along the southern border. 28 TT 3943-50 (Clark).

Appendix B

1. *Pasture Canyon*

The Hopi Tribe introduced testimony[65] and documentation[66] that Hopis were grazing in and around Pasture Canyon. Although a Navajo testified that he did not see Hopis grazing *east* of

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65. Roger Honahni testified that Gaseoma, Siletstiwa, Wesley Seguiva, Teddy Tomosie, Talesmaenewa, Naseyouma, Phillip Pongyawyma and Logan Loma grazed sheep beyond Moenkopi Canyon (Moenkopi Wash) to the north. 3 TT 401 (Deposition of R. Honahni). Further, Pongyagoitewa, Seweyumptewa, Danakhoinewa, Naseyouma, Lomaquaptewa, Kelhongnewa, Sewiltima, and Natwantewa herded their sheep up to Pasture Canyon. 3 TT 402-05 (Deposition of R. Honahni).

Ira Naseyouma testified that his father grazed sheep in the Pasture Canyon, and that Kyarsyawma's father grazed his horses in Pasture Canyon. 10 TT 1679-83 (Deposition of 1. Naseyouma). This was contradicted by the testimony of Ira's brother, Guy Naseyouma, who testified that his father's sheep were not grazed in the Pasture Canyon area until after 1937. Guy Naseyouma's testimony was corroborated by Roger Nasevaema, who lived with Ira and Guy's father, Naseyawma, in 1936, who stated Naseyawma grazed sheep southeast from the village on the far side of the wash. 2 TT 263-64 (Nasevaema).

See also, 7 TT 1152-53 (Dr. Adams) (Site 79, Hopi sheep corral visible in aerial photographs; Hopi rock art present); 10 TT 1514, 1519 (Dr. McCawley) (Pasture Canyon used by Hopis, based on water and range availability); Ex. 719, pp. 13-14 (McCawley report) (Pasture Canyon a "documented Hopi use area"; areas surrounding Pasture Canyon "maximum likelihood use area").

66. Gordon Page reported in 1937 that two bands of Hopis (Big Phillip [Pongyawma] and Puhugnovia) grazed in Pasture Canyon. Ex. 461. The Navajo Nation argues that there is no indication of where in Pasture Canyon this occurred, whether this occurred prior to 1937, nor whether the Hopis were successful.

Pasture Canyon in the 1930's,[67] the preponderance of the evidence reflects that at least two Hopi outfits grazed their livestock in Pasture Canyon in 1934.[68]

The evidence shows that Navajos were grazing in and around Pasture Canyon as well.[69] Dr. Russell's investigation revealed a number of Navajo Camps which had lived or herded inside Pasture Canyon.[70]

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67. *See*, 26 TT 3722 (Alex Morez).

68. Also, the Navajo Nation admits that the Hopis had fields on the floor of Pasture Canyon north of the reservoir and south of the government pasture.

69. Ex. 3248, the LMU3 Consumption Group Map, shows many camps on both sides of Pasture Canyon. Ex. 3175, p. 1108, the LMU3 Range Management Report, dated April 1937, identified five Navajo families with over 3,000 sheep units living and herding at Pasture Canyon in the summer. (Three of these families are designated as summering at the "head of Pasture Canyon", two to three miles to the north of the claimed Hopi exclusive area.) Further, Ex. 451, Gordon Page's 1937 report, *Moencopi Village Stock Operators and Range*, states, "[Hopi] sheep were also ranged through Pasture Canyon to the well at the upper end of the canyon [until twenty years ago]. At the present time two bands attempt to use range in this area, but report that Navajos living nearby have exerted pressure against Hopi grazing use."

70. The Hopi Tribe complains that Navajo expert Dr. Scott Russell conducted his archeological analysis and follow-up interviewing on the eve of trial, that the archeological site forms were produced to the Hopi Tribe during trial, and that the evidence is therefore entitled to little weight. The Navajo Nation argues that Dr. Russell's opinions and methods were disclosed by lengthy reports before trial, that the Hopi Tribe declined to take Dr. Russell's deposition after additional fieldwork had been done, and that Hopi expert witnesses also did additional work after initial reports had been disclosed.

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Appendix B

The Court finds that Camps 11,[71] 96,[72] 123,[73] 172,[74]

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The Hopi Tribe further claims that the information from Dr. Russell's interviews is not credible: the Hopis claim that Dr. Russell asked leading questions, left out information contradicting his opinions, and that his principal informants did not testify at trial.

Dr. Russell's general findings are represented in Ex. 3575 (camp lists, site forms, site maps, and photos of Navajo camps), and Ex. 3570 and 3571 (maps showing location of Navajo sites.

71. *Camp 11:* Dr. Russell testified that Harrison Knight and his family had rights to the "'Many Peaches" farming allotment in Kerley Valley, but had their primary summer residence at Site 3-11 on the eastern edge of Pasture Canyon. Although the site is currently the parking lot for the rodeo area in the Tuba City fairgrounds, there was evidence of a hogan and a corral area. They herded on both sides of and into Pasture Canyon, and east toward Greasewood Lake. 17 TT 2525-28 (Dr. Russell). The Hopi Tribe did not contest the location of the residence or herding of this Camp in its response to the Navajo Proposed Findings.

72. *Camp 96:* Bill and Martha Sawyer, related to Camp 11, resided adjacent to Site 3-11, and also herded in and around Pasture Canyon. 18 TT 2598-99 (Dr. Russell). The Hopi Tribe did not contest the location of the residence or herding of this Camp in its response to the Navajo Proposed Findings.

73. *Camp 123:* Dr. Russell testified that George and Mary Bancroft, Richard and Helen Tsinnie, and children of both families summered near Pasture Canyon at Site 3-79, from which they used the southern part of Pasture Canyon. The Hopi Tribe admits that this Camp most likely grazed within the claimed Hopi exclusive use in 1934.

74. *Camp 172:* Dr. Russell testified that a Navajo named Slim Mexican lived about 1/2 mile east of Pasture Canyon in the summer of 1934, near the

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178 [75] and 229 [76] grazed in or around Pasture Canyon in 1934; Camp 14 [77] did not.

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present rodeo grounds, and herded into the lower and upper canyon, and utilized Pasture Canyon for water. 18 TT 2647 (Dr. Russell). The Hopi Tribe did not contest the location of the residence or herding of this Camp in its response to the Navajo Proposed Findings.

75. *Camp 178:* Dr. Russell testified that Ray McCoughey (aka "McCally") and his family farmed at "Many Peaches" in Kerley Valley in the summer, and had two residence sites in Pasture Canyon. First, the family resided at Site 3-10, on the east edge of Pasture Canyon, and at Site 3-25, southeast of the canyon. Although neither site had any remains, Victor Saganitso took Dr. Russell to these areas. 18 TT 2667-69 (Dr. Russell). The Hopi Tribe did not contest the location of the residence or herding of this Camp in its response to the Navajo Proposed Findings.

76. *Camp 229:* Dr. Russell testified that Cyclone Morez had a residence, two fields and a natural rock corral in the Castle Rocks area, on the west side of Pasture Canyon at Site 3-13. 18 TT 2688-89 (Dr. Russell); 26 TT 3717-22 (Alex Morez). The Hopi Tribe did not contest the location of these residence and herding in its response to the Navajo Nation's Proposed Findings.

77. *Camp 14:* Dr. Russell testified that Albert Dugai and his family had a summer farm and residence in Kerley Valley, and another residence on the east rim of Pasture Canyon, designated as Site 3-12. Kenneth Dugai, Albert's son, showed Dr. Russell several hogan rings and a corral area at the site. The family herded both above and below the Pasture Canyon reservoir, but primarily to the east toward Greasewood Lake. 17 TT at 2545-50 (Dr. Russell).

The Hopi Tribe argues that the hogan at Site 3-12 did not exist in 1934, as it was not visible on the aerial photographs. Further, Charlie Huskon testified at deposition that he grazed his livestock at Shadow Mountain (west of Highway 89) in the summer around 1934, and that Kenneth Dugai also grazed there. 22 TT 3163 (Dr. Russell).

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The Navajo Nation also claims other camps brought their stock into Pasture Canyon for water, including Camp 41 (Saganitso), Camp 106 (S. Begody), Camp 123 (Bancroft), Camp 139 (F. Begody), Camp 149 (Begay), and Camp 166 (Chief). However, these camps all resided and herded in other areas, and will be considered elsewhere.

The Court finds that Pasture Canyon was jointly used by Hopis and Navajos in 1934.

2. *Ward Terrace*

The Hopi Tribe claims that Ward Terrace was used by a number of Hopis in 1934. The Court finds that the Dallas and the Humetewa brothers used this area, as evidenced by testimony [78]

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78. The testimony cited by the Hopi Tribe is inconsistent as to the number of Hopis herding on Ward Terrace. Roger Honahni testified that Henry, Robert and Steven Dallas, Henry, Alec, Eric, and James Humetewa, Samuel Shing, John Gaseoma, John Gashyesva, and John Jenkins grazed their cattle on Ward Terrace and in the area near Cameron. 3 TT 364 (Deposition of R. Honahni).

William Numkena testified that his father and uncles, Lewis and Earl Numkena, Ray Nasetoynewa, and Edwin Kaye, Roger, Roland and Stanley Honahni, Brian Gilbert, Frank Nutema, George Nuvayestewa, James Humetewa, Henry and Robert Dallas, Roger Q, and Honyamptiwa grazed their cattle on Ward Terrace. 6 TT 971 (Numkena).

Ira Naseyouma testified that Henry and Steven Dallas (who had about 300 cattle), and Henry and James Humetewa grazed stock on Ward Terrace. He further testified that the Dallas brothers built a house, corral, and two dams south of Secuva, and that their cattle grazed from Secuva to the highway (east of Cameron), the Little Colorado River, Accowsie Spring (on the western escarpment of Moenkopi Plateau), springs on the east side of cliffs at Waawala, (Cont'd)

and government documents.[79] This renders plausible the testimony of several Navajos that they did not see Hopis below

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and a spring called Lowava, south of Tuusiva. 10 TT 1631-32, 1665-67 (Deposition of I. Naseyouma).

James Humetewa testified at deposition that in 1934, his father and he and his brothers Alec, Henry, and Eric had about 129 cattle and four horses, and grazed on a lower plateau near Cameron, towards Sand Springs, eastward to the cliff at Moenkopi Plateau and Ward Terrace, and north to five miles south of Moenkopi Wash. Robert and Henry Dallas (his uncles) were using the same area in 1934, *although no other Hopis used this area*. He also testified that the cattle would go to the Little Colorado River south of Cameron if they could not find water, south of Cameron. 6 TT 1922-27 (Deposition of J. Humetewa). James Humetewa's testimony is the more credible as to individuals grazing in the Ward Terrace area.

See also, 8 TT 1191-95 (Dr. Adams) (Site 83 used by Dallas brothers, Humetewa family, Roger Honahni, Sam Shing, and Bryant Gilbert in 1934; Sites 140 and 158 were in use before 1934); 10 TT 1517 (Dr. McCawley) (opinion of Hopi presence based on government documents, forage and water resources); Ex. 719, pp. 10, 19-20 (McCawley report) (Ward Terrace "maximum likelihood Hopis use area").

79. Gordon Page's 1937 report stated that Henry Dallas was reported to drift his cattle west of the Moenkopi Plateau rim, but the report could not be confirmed. Ex. 451 at 2, *Moencopi Village Stock Operators and Range*, 4/15/37. The report also indicates that this area was shared with Navajo herders.

Ex. 2676, a report dated April 16,1937 by D.G. Anderson, Junior Range Examiner, states, "The present range use by the Hopis is Coal Mine Mesa, around the Moencopi Village, and Ward Terrace. This range is also used by Navajos."

Tonali on Ward Terrace during the mid-1930's,[80] because there were a limited number of Hopis in the area.

Navajos also grazed their livestock in the Ward Terrace area. Dr. Russell's investigation revealed four Navajo Camps on Ward Terrace. The court finds that Camps 13 (at Site 3-48)[81]

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80. *See*, 24 TT 34559 (Canyon), 27 TT 3783 (Huskon), and 25 TT 3562, 3574 (Keetso).

81. *Camp 13:* Dr. Russell testified that the Seschilie family occupied several residence sites on Ward Terrace since the 1920's, to which Dr. Russell was taken by King Seschilie, son of Lester Seschilie (aka Lester "Curly Hair"). 17 TT 2537, 2544 (Dr. Russell). In the wintertime, the family resided at Site 3-36, south of Ward Terrace (in the southwest corner of the claimed Hopi exclusive use area). Two hogan rings, a sheep corral, and a cattle corral remain. 17 TT 2530 (Dr. Russell). At the time of trial, the Seschilie family was using a cattle corral about a quarter mile north from that site. 17 TT 2532 (Dr. Russell). The Seschilie family also lived at Site 3-48 on Ward Terrace in the summer time. That site consisted of three hogans, a sweat lodge, and a corral area in a rock enclosure, and was used as a summer herding area. 17 TT 2540-42 (Dr. Russell). Dr. Russell also testified that the Seschilie family resided in and used a number of other sites in the summer time on the Moenkopi Plateau. These sites will be addressed in a later section of this order.

While Dr. Adams conceded that Seschilie lived on Ward Terrace during the 1930's, 8 TT 1296-97 (Dr. Adams), the Hopi Tribe argues that the Seschilie family did not reside in this area until after 1934. Dr. Adams testified that the only structure at Site 3-36 in 1934 was a frame house used by Hopi cattle ranchers, which was identified through the aerial photographs (Adams Site 83). 8 TT 1191-1196 (Dr. Adams). Louise Dugai, a member of the Seschilie family, told Dr. Russell that a frame house had burned down at this site, 22 TT 3157 (Dr. Russell), and Dr. Kelley mapped an ashy area in the place where Dr. Adams mapped the frame house. Ex. 3575, Camp 13, Site Form 3-36, p. 402117. This was not an "ash dump" characteristic of Navajo sites, because it was not on the

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and 168[82] grazed their livestock in the area; Camps

(Cont'd)
northeast side of the hogan door. 15 TT 2296 (Russell) (ashes are always dumped to the northeast of the hogan door). The Hopi Tribe contends that while there are discrepancies in the recollections of the Navajo informants regarding the year the Seschilies first started living at Site 3-36, the recollections of the Hopi informants were very clear that the Seschilie family did not move to the area until 1935-36, when the Ward Terrace cattle outfit split over support for the Indian Reorganization Act, and the Dallas brothers who remained on Ward Terrace hired the Seschilie family to help tend the cattle. Ex. 651, App. I, Site 83 (Adams report). The Court finds that the preponderance of the evidence shows that Site 3-36 was not occupied by Seschilie in 1934.

The Hopi Tribe also argues that the structure at Site 3-48, although visible on the aerial photographs, was not built by Navajos. Although round stone structures were built by Hopis as well, 7 TT at 1102 (Dr. Adams), Ex. 651, p. 71-74 (Adams report), and Hopi doors often face east as in Navajo hogans, Dr. Adams also stated the field or farm houses were nearly always square or rectangular." Ex. 651 at pp. 51, 59 (Adams report). Further, the Hopi Tribe argues that the information from Navajo informants is not credible as to this site. *See*, 22 TT 3166-70 (Dr. Russell) (King Seschilie did not identify Site 3-48 during the 1986 interview, but later identified the site in 1989; Ward Seschilie did not identify Site 3-48; Jerry Lewis identified the site as used by Doris Seller, a member of Camp 23, but Doris Seller did not mention living on Ward Terrace around 1934; Lena Reed Dallas, a Navajo woman married to Robert Dallas told Dr. Russell that her family lived at Site 3-48 "during the period of the goat reduction.") The Hopi Tribe did not present any evidence of Hopi use of this site, and James Humetewa, a Hopi, told Dr. Adams that Seschilie lived at this site in 1933. 8 TT 1298-99 (Dr. Adams). The preponderance of the evidence shows Site 3-48 was occupied by Seschilie in 1934.

82. *Camp 168:* Dr. Russell testified that Grace Skacy, one of John Skacy's wives, resided at Site 3-56 in the winter and Site 3-52 in the summer, just west of the claimed exclusive area, and grazed her sheep within the exclusive area. 18 TT 2631-32, 2639 (Dr. Russell). Dr. Russell testified that

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49 [83] and 170 [84] did not graze on Ward Terrace.

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there were remains of a sweat lodge and scattered wood from a hogan at Site 3-52 (to which he was taken by Graze Yazzie, Grace Skacy's daughter), and several hogan depressions and a corral at Site 3-56.

The Hopi Tribe argues that Site 3-52 was not present on the aerial photographs, though Site 3-56 (outside of the exclusive use area) was visible. However, the absence of a structure on the aerial photographs is not determinative. The preponderance of the evidence establishes that both sites were in use in 1934.

83. *Camp 49:* Dr. Russell testified that Frank Johnson and his family came to Kerley Valley in the summer to farm his mother's field (Mary Johnson, Camp 273). Frank Johnson had a summer residence at Site 3-5 on the northern Ward Terrace (not within the exclusive area), and claims to have herded his sheep inside the claimed Hopi exclusive area. The family reported getting water in Tonidigishi Canyon and Moenkopi Wash. 17 TT 2567-69 (Dr. Russell). However, Dr. Russell agreed that the Moenkopi Wash would have been their principal water sources, and that Tonidigishi was used only occasionally. Further, Camp 69 stopped using this area in 1936 or 1937, and it was thus not their "customary use area". 22 TT 3180-81 (Dr. Russell). The Court finds that Camp 49 did not use the area on Ward Terrace within the Hopi claimed exclusive use area.

84. *Camp 170:* Dr. Russell testified that Nalcody Biye (aka Begay) had a large field area on the northern part of Kerley Valley, west of the government farm, and a large stone house, a hogan and several corrals at Site 3-9 (north of the claimed exclusive area). The family had three summer herding sites on Ward Terrace (Sites 3-6, 3-7, 3-8). There was a corral and several residential structures at Sites 3-6 and 3-7, and a large stone house, a hogan, and a corral at Site 3-8. Mr. Biye was also known as "Mr. House" due to the stone houses he had built. Dr. Russell testified the family herded into the claimed Hopi exclusive area and sometimes watered the livestock at Salt Springs. 18 TT 2640-44 (Russell).

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The Court finds that Navajos and Hopis jointly grazed throughout the Ward Terrace area in 1934.

3. *Western and northern Moenkopi Plateau*

The Hopi Tribe claims that numerous Hopis grazed their livestock on the western and northern Moenkopi Plateau. The evidence clearly supports this conclusion.[85]

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The Hopi Tribe argues that the evidence shows that the customary grazing area of this Camp was west of the exclusive Hopi area, and that they only grazed within the exclusive area when vegetation became scarce. Tom Kibahi, a member of the Camp in 1934, indicated to Dr. Russell that they herded around and to the west of the sites, and that the main water source was Moenkopi Wash. Ben Bennally, another member of the Camp, told Dr. Russell that they would herd on top of Moenkopi Plateau when the vegetation was scarce. 22 TT 3205-12 (Dr. Russell).

The Court find that Camp 170 did not graze its livestock on Ward Terrace in 1934.

85. The Hopi Tribe introduced substantial testimony that Hopis grazed livestock in this area. Roger Honahni testified that Hopi cattle got water at Dusovah, Tsinngavah, and Du-wee-Veh-Pahu (in the vicinity of Tonali, on the western Moenkopi escarpment). 3 TT 370 (Deposition of R. Honahni). His father had a sheep camp at Tsinngavah. 3 TT 400 (Deposition of R. Honahni). Honahni also testified that there were cattle corrals one and one-half mile south of the village on the northern plateau, and another up the canyon by Cottonwood Springs, eight miles east from the village. 3 TT 391 (Deposition of R. Honahni).

William Numkena testified that a number of Hopis grazed their cattle south of the village on Moenkopi Plateau, and would corral the cattle two or three miles south of Moenkopi Village. 6 TT 971-73 (Numkena).

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There is also documentary[86] and testimonial evidence that Navajos grazed in this area. Dr. Russell's investigation

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Ira Naseyouma testified that his father had a number of sheep corrals: one was just east of Posiwlelena (on the northern Moenkopi Plateau), and another four miles west of Posiwlelena, which was used by many people. 10 TT 1593, 1600-01 (Deposition of I. Naseyouma). He also testified that Pongyangoytiwa (Palmer), Teddy Honyamtiwa and Siwiyamtiwa grazed south of the wash and north of Owl's Cap, and that Willard Holmes, Logan Loma, and Benny Tiwa grazed northeast of Highway 264, west of Coal Mine Canyon, and south of the wash. 10 TT 1613-14 (Deposition of I. Naseyouma). Further, he testified that "almost everyone's" cattle grazed near a spring called Tuusiva, along the western escarpment of the Moenkopi Plateau near Singaba. 10 TT 1655-57 (Deposition of 1. Naseyouma). However, Ira Naseyouma had an eye operation in 1934 that required him to spend several months in the spring of 1934 in the hospital and at home, 11 TT 1690-92 (Deposition of I. Naseyouma), lending his account of where sheep were grazed in 1934 less credible.

Guy Naseyouma testified that his horses grazed toward Owl's Cap past Crater Well (about two miles from Moenkopi Wash), and that he herded his father's 80-100 sheep in this same area. 11 TT 1811-17 (Deposition of G. Naseyouma). His father's sheep corral was northwest of where the bridge on the road to Oraibi crossed the wash (by the present day rest area), and he also herded in this area. 11 TT 1809-11, 1834 (Deposition of G. Naseyouma).

See also, 4 TT 540-546 (Dr. Godfrey); 7 TT 1159 (Dr. Adams) (Site 145, rock art dated to 1933 and informants indicated Hopi cattle and sheep watered here); 8 TT 1190-91 (Dr. Adams) (Site 141, a water catchment area used as livestock area).

86. Ex. 3248, the LMU3 Consumption Group Map, shows 23 camps on western and northwestern Moenkopi Plateau. Further, Ex. 451, Gordon Page's 1937 report, *Moencopi Village Stock Operators and Range*, states, "At the present time, due to drought conditions, eight other Navajos groups from the vicinity of Grey Mountain have moved in to use . . . the springs along the western scarp of Moencopi Plateau . . ."

revealed numerous Navajo Camps using this area in 1934.[87] The Court finds that Camps 13,[88] 15,[89] 36,[90] 44,[91] 63,[92] 96,[93] 124,[94]

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87. Dr. Russell testified that many camps had deviated from their usual use areas in the 1930's, either by moving into Ward Terrace, Moenkopi Plateau or Coal Mine Mesa when water and forage in the usual use areas failed. The Hopi Tribe thus argues that Dr. Russell's testimony failed to establish that the Navajo activity was regular and on-going, and that Navajos had deviated from their previously established customary use areas. However, the rights and interests of the Tribes in the 1934 Reservation are tied to their use in 1934, as long as that use was sufficiently intensive.

88. *Camp 13:* Dr. Russell testified that the Seschilie family occupied several residence sites since the 1920's, to which Dr. Russell was taken by King Seschilie, son of Lester Seschilie (aka Lester "Curly Hair"). 17 TT 2537, 2544 (Dr. Russell). Dr. Russell testified that the family used Site 3-50 in the summertime, located on the Moenkopi Plateau just south of Seller Spring. There are several hogan rings, a sweat lodge, and an extensive trash area are visible there today. 17 TT 2533 (Dr. Russell). The daughter of Louise Skacy, who took Dr. Russell to this site as well, indicated that Louise Skacy lived with Lester Seschilie here as early as the mid 1920's. 18 TT 2634 (Dr. Russell).

The Seschilie family also lived at Site 3-51, a summer residence for herding sheep. When some of the family would go to the wife's farm in Kerley Valley, the others would take the sheep to this site, closer to Kerley Valley, less than a mile northwest of Tonidigishi Spring. 17 TT 2536 (Dr. Russell). The family lived in a tent in this area, so the archeological remains were minimal, including rocks used for the base of the tent, a hearth area, and a few areas of trash. 17 TT 2537 (Dr. Russell).

The Navajo Nation also claims that the Seschilie family had two residences on Ward Terrace: a winter site at Site 3-36, and a summer site at Site 3-48. These sites are discussed in the section on Navajo presence on Ward Terrace.

The Hopi Tribe contends that the Seschilie family did not reside in this area until after 1934, arguing that Site 3-50 does not appear on the aerial

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photographs. Further, the Hopi Tribe argues that since the Seschilies resided at Site 3-51 in conjunction with Site 3-50, if site 3-50 was not present in 1934, neither was Site 3-51.

The preponderance of the evidence shows that Camp 13 resided and grazed in this area in 1934.

89. *Camp 15:* Dr. Russell testified that Silas and Mary Lee resided at Site 3-69, at the extreme west end of Kerley Valley. There are no archeological remains, as the location is now covered by municipal sewer ponds. The family hobbled their horses and mules at night on top of the Plateau. 17 TT 2550-52 (Dr. Russell). The Hopi Tribe did not dispute the location and grazing area of this camp in its response to the Navajo Proposed Findings.

90. *Camp 36:* The Goldtooth family lived in this area year-round. 17 TT 2555-57 (Dr. Russell) 24 TT 3424-68 (Lena Goldtooth Canyon). Dr. Russell identified three sites used by Camp 36: Sites 3-32, 3-28 and 3-62. Only Site 3-32 ("Goldtooth Springs") is within the claimed Hopi exclusive use area.

Lena Canyon also recalled other Navajo families who herded near their residences. Adolph Heavy (the father of both of Goldtooth's wives) farmed at Goldtooth and resided at both Goldtooth and Goldtooth Springs); Akaali (married to two of Adolph Heavy's other daughters), resided and farmed at Goldtooth and resided at Goldtooth Springs); Tsiishchili ("Seschilie" or "Curly Hair"), lived near Seller Springs and on the Ward Terrace; the Talker and Deer Water lived near Tonali; Naa'tah lived at Tonali. Canyon also testified that she did not see Hopis in either the Goldtooth or Goldtooth Springs area. 24 TT 3444-63, 3467-68 (Canyon).

The Hopi Tribe contends that the Goldtooth family only resided about four miles to the south of the Hopi exclusive area at "Goldtooth Ranch", at Sites 3-28 and 3-62, at which a field was visible on the aerial photographs. Ex. 3547 (Site U13); Ex. 3549 (Site U13).

The Court finds that a preponderance of the evidence indicates that the
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Goldtooth Camp used Site 3-32, and that other Navajos used the land in this area in 1934.

91. *Camp 44*: Dr. Russell testified that Jake Bracker and his family lived at Site 3-72 during the summer at "Standing Big Tree" at Joe Notooth's farming site, immediately north of the Hopi "exclusive use area". (Jake's wife, Leila, was the daughter of Joe Notooth, and resided very close to Notooth during parts of the year). 17 TT 2561 65 (Dr. Russell). Camp 44 herded into the "exclusive use area". 17 TT 2565 (Dr. Russell). Camp 44 also lived at another site on the Moenkopi Plateau by Seller Spring, Site 3-58; although this site had no archeological remains, Dr. Russell was taken to this site by Jerry Lewis, son of Leila Bracker. 17 TT 2565 (Dr. Russell).

The Hopi Tribe states that this camp was related to Camp 173 and typically moved with it, 17 TT 2561 67 (Dr. Russell), and that there is insufficient evidence to conclude that either Camp 44 or Camp 173 resided or grazed within the "exclusive area". These arguments will be addressed with reference to Camp 173.

92. *Camp 63:* Dr. Russell testified that John Canyon and his family farmed in Kerley Valley in the summertime, north of the school farm. Dr. Russell also testified that the members of this camp resided in three areas: south of the wash at Site 3-63, near the home of John Skacy and slightly north of that at Site 3-65, at which the camp had a hogan and a sheep corral. Only the sheep corral is still present. The family also had a summer residence on top of Moenkopi Plateau at Site 3-66, to the east of Site 3-65, at which they had a corral. From the two corrals, the family herded on the northwest corner of Moenkopi Plateau and south to the Tonidigishi area. 18 TT 2585-89 (Dr. Russell).

The Hopi Tribe contends that there is insufficient evidence that Camp 63 resided or grazed south of Moenkopi Wash in 1934, based on its claim that John Skacy did not live south of the Wash. Since the Court has found that Skacy did not live south of the Wash in 1934, the Court finds that Camp 63 also did not reside at Site 3-63 in 1934. However, the Hopi Tribe did not introduce any

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168,[95] 171,[96] 173 (at Sites 3-78, 3-41, 3-70, and 3-75),[97] 185,[98]

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evidence to disprove the Navajo claim that Camp 63 also resided at Site 3-66, and herded on the northwest corner of Moenkopi Plateau. The Court thus finds that Camp 63 used this area in 1934.

93. *Camp 96*: Dr. Russell testified that Bill and Martha Sawyer had a corral at "Many Peaches" in Kerley Valley (Site 3-37), where Bill's ancestor, Charlie Ettsity, had farming rights. They herded on the Moenkopi Plateau, south of the wash. 18 TT 2599 (Dr. Russell). The Hopi Tribe did not dispute the location of this camp in its response to Navajo Proposed Findings.

94. *Camp 124:* The families of Silas Talker and Maxwell Yazzie, and John and Albert Denetso used the Tonali area for herding in the summer, and lived just south of Seller Spring. The site was not numbered because John Denetso, Dr. Russell's informant, was ill and could not take Russell to the site. Denetso told Russell that they grazed on the Moenkopi Plateau, between Tonidigishi and Goldtooth Springs. 18 TT 2618-19 (Dr. Russell).

The Hopi Tribe argues that this information was contradicted by other informants: Robert Blackhair and Billy Yazzie, brothers of Maxwell Yazzie, told Dr. Russell that Maxwell had a farm at Moenave, but did not know about the locations of the other camp members. 23 TT 3280 (Dr. Russell). Further, the LMU3 Range Management Report, Ex. 3175, indicates that Maxwell Yazzie lives "year long five miles west of Cameron . . . Cattle on east side of Gray Mountain." 22 TT 3281 (Dr. Russell).

Although this information indicates that Maxwell Yazzie did not use the Tonali area in 1934, the Hopi Tribe did not contradict the other Camp members' use of the area, and the Court finds Camp 124 used the area in 1934.

95. *Camp 168:* Dr. Russell testified that John Skacy's wives, Louise and Grace, each had their own herd, and herded in different areas. Grace lived with John Skacy's mother in Kerley Valley; the family had farming plots north of the
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Moenkopi Wash, and a house on the south side of the Wash, with which several corrals and sweat lodge areas were associated (Site 3-19). 18 TT 2630 (Dr. Russell). They also had a residence site on top of Moenkopi Plateau where they herded, and at which was located a stone-bottom hogan and stone corral (Site 3-53). 18 TT 2631-32 (Dr. Russell).

The Court previously found that John Skacy did not have a house south of the Wash in 1934. However, the Hopi Tribe did not challenge the location or herding area at Site 3-53, and the Court finds that Camp 168 grazed livestock in this area.

96. *Camp 171:* Dr. Russell testified that Fred Little Smith and his family moved to the Tonali-Seller Spring area in summer for water and herding. Agnes Bighorse, a daughter of Fred, told Dr. Russell that they lived a half a mile south of Seller Spring; because Dr. Russell did not visit the site, it was not numbered. 18 TT 2646 (Dr. Russell). The Hopi Tribe did not contest the location of this site in its response to the Navajo Proposed Findings.

97. *Camp 173:* Dr. Russell testified that Joe Notooth and his family had two primary farming areas. One was at Standing Big Tree (Site 3-70) with an associated field and corral (Site 3-71) 18 TT 2648 (Dr. Russell). Notooth also had a farm in Kerley Valley, north of the Wash and west of the government field; site 3-67 was a residence and site 3-75 was a sheep corral south of the wash associated with this field. 18 TT 2650 (Russell). Dr. Russell testified that Notooth and his daughter Mrs. Bracker (Camp 44) also utilized sites in the Tonidigishi area at Site 3-78, and had a storage pit at Tonali at Site 3-41. 18 TT 2652-53 (Dr. Russell). Also, the family had a residence, Site 3-55, and a corral area, Site 3-43, at a location called "Where the black plant grows." 18 TT 2653-54 (Dr. Russell) (a number of people told him this area was used by Navajo families, and Jerry Lewis informed Russell that Lewis' family had used the corral).

The Hopi Tribe argues that claims that Camp 173 resided at six different spring and summer sites are not credible; however, Dr. Russell explained that
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Notooth divided up his herd to utilize more than one grazing area at a time. 18 TT 2655, 22 TT 3212-56 (Dr. Russell).

The Hopi Tribe first challenges Notooth's presence at Site 3-55 and 3-43 (listed as Adams Site 110). Dr. Warburton testified that the lack of any mass-produced Euroamerican artifacts at Site 3-55 ("Where the black plant grows") indicated that it dated earlier than 1934. Ex. 3575, Camp 173, Site Form 3-55, p. 402205. 22 TT 3245-48 (Dr. Russell). Further, William Numkena testified that he never saw a Navajo hogan near Ironwood Springs (Site 3-55). 30 TT 4196-97 (Numkena). The Court concludes that Sites 3-55 and 3-43 were not used in 1934.

The Hopi Tribe also challenges Navajo use of Sites 3-78 and 3-41. Numkena testified he did not see a Navajo hogan or house near the springs along the western escarpment of the Moenkopi Plateau. 30 TT 42014 (Numkena). However, there is substantial evidence that Navajos resided in this area in 1934, and the Court finds that Notooth used Sites 3-78 and 3-41 in 1934.

The Hopi Tribe acknowledges that Notooth herded in the Standing Big Tree area, and to the south on the southern Moenkopi Plateau. Numerous Hopi and Navajo informants placed Notooth in these areas. 7 TT 1054 (James Humetewa placed him on the southern Moenkopi Plateau); 23 TT 3394 (Dr. Russell) (Lena Begay, Notooth's daughter, told Russell that Notooth used the Standing Big Tree area and the southern Moenkopi Plateau); 23 TT 3396 (Dr. Russell) (Lelia Souie, Notooth's daughter, told Dr. Russell that Notooth lived at Standing Big Tree and farther east at Coal Mine Canyon, and the southern Moenkopi Plateau, including Goldtooth and Sand Springs); 28 TT 3912 (Nettie Nez) (Notooth resided and grazed on the southern Moenkopi Plateau); Ex. 660, p. E26470 (Sam Shing told Dr. Adams that Notooth lived in the Cow Springs area, east of the exclusive area); Ex. 660 p. E26501-02 (Willard Holmes recalled that Notooth farmed at Standing Big Tree). The Hopi Tribe admits that Camp 173 would have passed through the exclusive area in its travel between Standing Big Tree and the southern Moenkopi Plateau (and possibly the farm in Kerley Valley).

(Cont'd)

Appendix B

189,[99] 238,[100] and 273 (as to a grazing area outside Site 3-55),[101]

(Cont'd)

The Hopi Tribe did not contest that Site 3-75 was used by Notooth in 1934. The Court concludes that Sites 3-78, 3-41, 3-70, 3-71 and 3-75 were used by Notooth in 1934.

98. *Camp 185:* Dr. Russell testified that while Tony Bignose and his family farmed in Kerley Valley during the summer, they utilized the same residence site as Henry Billy of Camp 125 (Site 3-18), and hobbled the farm animals on top of the Moenkopi Plateau at night. 18 TT 2675-76 (Dr. Russell). The Hopi Tribe did not contest the location and herding area of this Camp.

99. *Camp 189:* Philip Tracy (and his brother Dan Tracy, designated as Camp 187) farmed on the western end of Kerley Valley, and herded livestock in the Tonidigishi-Tonali area in the summertime. 18 TT 2678-79 (Dr. Russell). The Hopi Tribe did not object to the location and herding area of this Camp in its response to the Navajo Proposed Findings.

100. *Camp 238:* Dan Bighorse (the son of Gus Bighorse) and his family herded in the Tonali area and had a residence site south of Seller Springs in the summertime. 18 TT 2689-91. (Dr. Russell). The Hopi Tribe did not object to the location and herding area of this Camp in its response to the Navajo Proposed Findings.

101. *Camp 273:* Dr. Russell testified that Mary Johnson farmed on the north side of the wash in Kerley Valley, and kept her sheep herd in that area. Her grandson, James Tsinnie (from Camp 184), helped with her fields, and had a house at Site 3-21, close to the diversion dam in Kerley Valley where he was employed to control water flow. Tsinnie also herded sheep and goats on the Moenkopi Plateau from a corral at Site 3-35, on the south side of Moenkopi Wash. 18 TT 26772 (Russell).

Site 3-21 cannot be counted as a Navajo residence site because James Tsinnie lived there only while employed to control the diversion dam; Dr.

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grazed on the northern or western Moenkopi Plateau in 1934, and that Camps 82,[102] 85,[103] 144,[104] and 299[105] did not.

(Cont'd)
Russell did not consider the residence to be part of Tsinnie's "customary use area". 23 TT 3325 (Russell).

Dr. Russell testified that Site 3-35 was on a Navajo allotment, and cannot therefore be claimed by the Hopi Tribe. However, the area outside of the allotment on which Tsinnie herded can be claimed.

102. *Camp 82:* Dr. Russell testified that Scott Preston and his family lived in the Tonali area during the summer. This residence did not have a site number, as Dr. Russell was unable to visit the site with the informant, John Roberts. 17 TT at 2593-94 (Dr. Russell).

The Hopi Tribe argues that Camp 82 primarily grazed its livestock north of Tuba City (toward Preston Mesa), and only occasionally crossed Moenkopi Wash to graze on the Moenkopi Plateau. See 22 TT 3201-03 (Dr. Russell) (John Roberts told Dr. Russell that his family only "went to Moencopi Plateau once in a while"). This indicates that Camp 82's use of Moenkopi Plateau was not sufficiently intensive.

103. *Camp 85:* Dr. Russell testified that an individual named Joe Bush (aka, "the Seller") occupied two residences in 1934: he lived at Site 3-30, south of the Hopi "exclusive area", and at a site overlooking Seller Spring, an area named for his close residence to it. The latter site was not recorded with a site number, although Dr. Russell testified it was immediately next to Site 3-50. A number of informants mentioned that Joe Bush herded on the Moenkopi Plateau. 18 TT 2595-97 (Dr. Russell).

The Hopi Tribe argues that there is no evidence that Joe Bush had a residence at Seller Springs: there is no evidence of hogan remains, Ex. 3575, Camp 85, Site Form 3-50B, p. 402164, and it did not appear on the 1934 aerial photographs. Further, William Numkena testified that he saw no hogan near Seller Spring around 1934, 30 TT 4201-04, and Lena Goldtooth Canyon

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testified that after his wife died in 1929, the Seller moved back and forth between his son's home at Willow Springs and her family's home at Goldtooth. 24 TT 3464-65 (Canyon). This latter testimony was confirmed by Margaret Goldtooth. Ex. 3609, p. 51-52.

The Court finds that Camp 85 did not use Moenkopi Plateau within the claimed Hopi exclusive use area.

104. *Camp 144:* Dr. Russell testified that Gus Bighorse's children, Tina, Bessie, and Floyd, herded in the Tonali and Tonidigishi area in the summer time. They lived in a shade or tent in the summer; the residence site was not numbered, as Dr. Russell did not visit the site. Gus Bighorse lived in Kerley Valley year round because he was blind, and some family members stayed with him and farmed during the summer. 18 TT 2625-26 (Dr. Russell).

The Hopi Tribe argues that there is insufficient evidence that Camp 144 herded in the Tonali area. Dan Bighorse, Gus's son, told Dr. Russell that Camp 144 did not have any livestock by 1934. Tina Butler, Gus's daughter, told Dr. Russell that Camp 144 was herding in the Tonali area, but had mixed up the sequence of events surrounding livestock reduction, and was not reliable for dates. 22 TT 3203-05 (Dr. Russell).

The preponderance of the evidence shows that Camp 144 did not use the Tonali area in 1934.

105. *Camp 299:* Dr. Russell testified that Mark Twain farmed in Kerley Valley and had a corral at Site 3-19, on south side of Moenkopi Wash, by the John Skacy house. Twain lived just west of Site 3-67 (designated as Camp 173). Dr. Russell testified that he grazed on the Moenkopi Plateau, but did not have the exact location of grazing, as most members of his family were deceased. 18 TT 2694-95 (Russell).

As previously discussed as to Camps 63 and 168, the Court found that John Skacy's house was not established until after 1934, and the preponderance of the evidence shows that Camp 299 did not use this area in 1934.

Appendix B

4. *Southern and Central Moenkopi Plateau*

The Hopi Tribe introduced substantial evidence that the central and southern areas of Moenkopi Plateau was grazed by Hopi livestock,[106] Although the Navajo Nation argues there is no

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106. Roger Honahni testified that Earl and Walter Albert had stock south of Buck Pasture (around Hukvahklo), and still use the same area. 3 TT 3590 (Deposition of R. Honahni). Roger Honahni testified that other Hopis grazed and watered cattle as far south as Hukvahklo before the Buck Pasture fence was built and that cattle got water at a small canyon named Masiskyavehk. 3 TT 365, 387-89 (Deposition of R. Honahni). Further, Honahni grazed his horses from Moenkopi Wash, south to Howell Mesa/Hukvahklo. 3 TT 407-08, 410 (Deposition of R. Honahni).

William Numkena testified that many Hopis went as far south as Masitsotsmo to round up cattle, 12 miles south of Moenkopi to Buck Pasture, and would use the dugouts at Buck Pasture. 6 TT 973, 976 (Numkena).

James Humetewa testified that Earl, Sam, and Lewis Numkena, Roger Honahni, Frank Nutima [Nuhtayma], Jackson Tewa, Edwin Kaye, Logan Loma, Frank Seumptewa, Kopulvu, Nasitoyniwa, Big Phillip, and Gaseoma would graze from Moenkopi Plateau to Sand Springs (on the 1882 Reservation). 6 TT 1029-30 (Deposition of J. Humetewa). Although this area is not specific, it appears to be on the southern Moenkopi Plateau.

Ira Naseyouma testified that Walter Albert had a corral 5-6 miles south of Buck Pasture, west of Howell Mesa, which was used in 1934. 10 TT 1602-03 (Deposition of I. Naseyouma). He also testified that Frank Nuhtayma and Ezra Hungeva had cattle which watered at a spring five miles west of Owl's Cap, and grazed south to Howell Mesa. 10 TT 1608, 1611 (Deposition of I. Naseyouma). Further, he testified that cattle belonging to Edwin Kaye, Jackson Tewa, Milo Tewa were near Wuukotutskwa (a long area extending south from the old Coal Mine, down the edge of the 1882 Reservation, to the southern edge of Moenkopi Plateau), out to Hootatsomi, 3-4 miles from Howell Mesa. 10 TT 1621-23 (Cont'd)

credible evidence that Moenkopi Hopis grazed south of the Buck Pasture northern fence, the Court finds that Hopis grazed throughout Buck Pasture to Hukvahklo in 1934.[107] There is not

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(Deposition of I. Naseyouma). He also testified that Kyarsyawma had a couple of corrals near his farm south of Paqlo, and grazed west to Masiskya and east of what is now Buck Pasture (near the old coal mine), 10 TT 1645-51 (Deposition of I. Naseyouma), and that cattle and horses, owned by a number of Hopis including Edwin Kaye, Jackson Tewa, Jackson Tuutsawina, Roger Honahni, and Nuutayma grazed at Hukvaqlo, 5-6 miles south of Kyarsyawma's farm. 10 TT 1651-52 (Deposition of 1. Naseyouma). He further testified that various Hopis grazed stock during the winter west and east of Goldtooth. 10 TT 1653-54, 1657-58 (Deposition of I. Naseyouma). "Everyone's cattle and horses" grazed in area now called Buck Pasture. 10 TT 1660 (Deposition of I. Naseyouma). As Ira Naseyouma had an eye operation in 1934 that required him to spend several months in 1934 in the hospital and at home, 11 TT 1690-92 (Deposition of I. Naseyouma), his account of where livestock were grazed in 1934 may be overinclusive.

See also, 7 TT 1166-70 (Dr. Adams) (Site 104, sheep corral used by Gaseoma and Big Phillip outfit; Site 106, sheep corral used either by Siletstiwa or Fred Honahni; Site 132 (just north of Bakalo), two corrals used by Jackson Tewa); Ex. 719, pp. 12-13 (McCawley report) (southern Moenkopi Plateau part of "documented Hopi use area").

107. In 1937, Gordon Page reported that the Moenkopi Hopi livestock range was confined north of the Buck Pasture fence. Ex. 451 at 2, *Moencopi Village Stock Operators and Range*, 4/15/37; and Ex. 493 at 36-37. However, the fence at Buck Pasture was built after 1934, and there was no barrier to Hopi livestock. Dr. McCawley reported that in 1937, the SCS foreman supervising the construction of the Buck Pasture fence removed 200 Hopi cattle from the area. Ex. 719, p. 13, IS (McCawley report) (southern Moenkopi Plateau "almost certainly" used by Hopis).

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sufficient evidence to conclude that Hopis *from the 1882 Reservation* were grazing on the southern Moenkopi Plateau.[108]

Navajos grazed on the southern Moenkopi Plateau as well, as is implicit in the Hopi Tribe's exclusion of areas south of Buck Pasture, such as Goldtooth, from its claimed exclusive area. The

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Further, the Navajo Nation argues that the testimony of James Humetewa,Roger Honahni, and Ira Naseyouma that they grazed south of the Buck Pasture fence is inconsistent with the testimony of Hopi expert Dr. Adams, who admitted there were no physical remains or other archaeological evidence of any Hopi activity on the Moenkopi Plateau south of Owl's Cap. 8 TT 1197-98, 1225-27 (Dr. Adams). However, archeological evidence is not necessarily available regarding Hopi cattle and horse grazing.

The Navajo Nation also cites the testimony of Navajos who lived and grazed livestock on southern Moenkopi Plateau that they did not see Hopis or Hopi livestock in their grazing areas. 24 TT 3467-68 (Canyon) (no Hopis were herding around Goldtooth or "Pull the water out"); 25 TT 3561-63 (Keetso) (no Hopis grazing around Gold Spring); 28 TT 3919-20, 3923 (Nez) (no Hopis grazed at a place called "Windy Water"). This Court will accept Hopi testimony as it is supported by government documents.

108. The SCS investigations identified only one Third Mesa Hopi outfit grazing cattle outside LMU6 into LMU3 (Earl and Walter Albert and Simon Polingyamtiwa (aka Simon Seekayouma)), near well 178 west of Howell Mesa. (Ex. 480 at 1-2). However, part of LMU3 is inside the 1882 Reservation, and well 178 and Howell Mesa are inside the 1882 borders. Although Ira Naseyouma testified that some of Walter Albert's livestock grazed on the southern end of Moenkopi Plateau, some of the Plateau is within the 1882 border, and Naseyouma admitted that the livestock tended to water near Howell Mesa. 11 TT 1671-72 (Deposition of I. Naseyouma),

Appendix B

Court finds that Navajos did not graze north of the claimed Hopi exclusive area border.[109]

The Court finds that the central and southern Moenkopi Plateau to the border of the claimed Hopi exclusive area was exclusively used by Hopis in 1934; the area south of that border to Hukvahklo was jointly used in 1934.

5. *The Bakalo (or Hollow Place)*

There is evidence that Hopis grazed in the Bakalo,[110] and the

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109. Dr. Russell testified that Camp 273 occupied a hogan at Site 3-4 and a corral at Site 3-44 on the Moenkopi Plateau north of the Hollow Place in 1934. 23 TT 3327 (Dr. Russell). No hogan remains were found at Site 3-4, although Dr. Russell testified that any remains there may have been disturbed by recent squaw dances. 23 TT 3328 (Dr. Russell). Dr. Russell did not recall if other informants besides James Tsinnie had reported that Navajos lived in this area in 1934. 23 TT 3330 (Dr. Russell). The hogan at Site 3-4 was not visible in the aerial photographs. Finally, William Numkena testified that he did not see a hogan in this area in 1934. 30 TT 4197-98 (Numkena). The evidence indicates Site 3-4 was not used in 1934.

The corral at Site 3-44 was also designated as Adams' Hopi Site 132. 23 TT 3327 (Dr. Russell). Dr. Russell testified that he did not determine whether Hopis had used this site in 1934. 23 TT 3328 (Dr. Russell). Dr. Adams' interviews indicated that Jackson Tewa used the site in 1934. 7 TT 1170-71 (Dr. Adams); Ex. 651, App. I, Site 132 (Adams report). The Court finds that Site 3-44 was used by Hopis in 1934.

110. Ira Naseyouma testified that Frank Nuhtayma and Ezra Hungeva had cattle which grazed "out to Paqlo". 10 TT 1610 (Deposition of I. Naseyouma). As discussed previously, his account of where sheep were grazed in 1934 may be overstated.

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Navajo Nation admits Hopis farmed in this area. Navajos also used the area for grazing.[111] The Court finds the Bakalo was jointly used.

6. *The Little Bakalo*

Although there was limited testimony that Hopis used this area in 1934,[112] the preponderance of the evidence shows that Hopis did not use this area for grazing until 1935.[113] Other evidence reflects that Navajos used this area for grazing in 1934.[114]

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See also, 7 TT 1171-73 (Dr. Adams) (Site 93, with remains of a dugout and two sheep corrals, and rock art with the names John and Russ (sons of Gaseoma), dated 11-18-34, used by Gaseoma and Big Phillip outfits; Site 88, stone house used by Milo Tewa); Ex. 651, App. I, Sites 88, 93 (Adams report).

111. Clark Keetso testified that he, Notooth, Herbert Zannie, Tillman Hadley, and Asdzaa Hoozhood grazed their animals into the Hollow Place. 25 TT 3541-42 (Keetso). This testimony was not contradicted by the Hopi Tribe.

112. William Numkena testified that Hopi herders would use dugouts at Little Bahk-Lo (Hollow Place) when herding cattle to the south. 6 TT 976 (Numkena).

113. Roger Honahni testified he maintained a shelter in this area, but admitted it was not built until after a windmill was built there in 1934 or 1935. 3 TT 339 (Deposition of R. Honahni) (Adams Site 97). Dr. Adams admitted that there was no Hopi improvement in this area in 1934, and that Hopis attempted to move into this area only after a windmill was constructed by the government in 1935. 8 TT 1197-98, 1292 (Dr. Adams) (Sites 97, 130 probably built after 1935).

114. 25 TT 3541-42 (Clark Keetso); 18 TT 2621 (Dr. Russell).

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7. *Coal Mine Mesa*

The Hopi Tribe introduced substantial evidence that Hopi livestock grazed in the Coal Mine Mesa area in 1934.[115] The

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115. Roger Honahni testified at deposition that in 1932, his cattle grazed at Coal Mine Mesa, 3 TT 345 (Deposition of R. Honahni). Other Hopis also had cattle in this area, including Jackson "T", Frank, Lewis, Earl and Sam Nutema, Polihongva, Seweyestewa, Koiyaheptewa, Tewangoitewa, Philip Pongyowyma, Burton, Edwin, Wilson, and Forrest Kaye, Henry, Robert, and Steven Dallas, James, Eric, and Alec Humetewa, Nasetoynewa, Logan Loma, Gaseoma, Siletstiwa, Milo Tewa, Wesley Seeguywa, Brian Gilbert, Edward Joneyestewa, Teddy Tomosie, George Nuvayestewa, Gashyesva, Billy Humetewa, Gilbert Quache, and his son Stanley Honahni. 3 TT 346-48 (Deposition of R. Honahni). He testified that cattle got water from Moenkopi Wash at Cow Tracks (the head of Coal Mine Canyon) at the bottom of the springs in Coal Mine Canyon, Dumahtep, and Porskwi. 3 TT 370, 373-74, 377-78, 3885, 387-88 (Deposition of R. Honahni). Further, the Pongyowyma brothers (Hopis) had sheep and a rock house at Tsorspatuikavehk. 3 TT 381-82.

Ira Naseyouma testified his father's cattle grazed east to Tsorspatuyqa, east of the sand dunes, southeast of Posiwlelena. 10 TT 1606 (Deposition of I. Naseyouma). He also testified that George Nuvayestiwa and Nasitoyniwa grazed around the sand dunes and west of the old Coal Mine, and that Milo Tewa, Wilson Kaye, Ezra Hungeva, Herman Honyamtiwa, Willie and Louis Numkena, and Ray Nasitoyniwa grazed west of the sand dunes, south of the coal mine around Ankinamuru. 10 TT 1615-17 (Deposition of I. Naseyouma). Naseyouma also testified that after Kyarsyawma separated from his father in the early thirty's (1932-36), he moved toward the sand dunes toward Coal Mine at Tepsotsmo (or Pipkyaqlo). 10 TT 1635 (Deposition of I. Naseyouma). Kyarsyawma also had a sheep corral 2 miles north of Tsorspatuyqa, which he used *before* he separated with father. 10 TT 1643 (Deposition of I. Naseyouma). As discussed earlier, his account of where sheep were grazed may be overstated.

See also, 4 TT 540 16 (Dr. Godfrey) (Hopis, including the Dallas group, Jackson Tewa, James Humetewa, Roger Honahni, Edward Kaye, Lewis and Earl Numkena, and Frank Nuhtayma grazed cattle on Coal Mine Mesa, and

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Appendix B

Navajo Nation argues that Hopis were confined to the southwestern portion of Coal Mine Mesa,[116] but the evidence shows that Hopis grazed in other areas as well, including "around the sand dunes" at Nanmuru.

It is also clear from the evidence that Navajos grazed livestock in the Coal Mine Mesa area.[117] Dr. Russell's

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Gaseoma, Teddy Honyanpewa, Nasioma, "Big Phillip", Logan Loma, Ernest Holmes, and Charlie Talawipi grazed sheep on Coal Mine Mesa); 7 TT 1173-79 (Dr. Adams) (Site 85, water catchment used to water Hopi sheep; Site 87, corral and circular stone structure used by Big Phillip; Site 86 was occupied by Navajos in 1934); Ex. 719, pp. 10-12 (McCawley report) (Coal Mine Mesa "documented Hopi use area").

116. The SCS Human Dependency Schedules shows that certain Hopis grazed in the southwest portion of Coal Mine Mesa. Ex. 16, (Sam Numkena, 3 mile S.W. of Coal, all year); Ex. 17 (Ray Nasitoyniwa and Bryan Gilbert, 4 mile W. of Coal Mine, all year); Ex. 18 (Ernest K. Moore, 4 mile W and SW of Coal Mine, winter, 4 mile W Coal Mine summer); Ex. 19 (Frank Nuhtayma, vicinity of Coal Mine, all year); Ex. 21 (Roger Honahni, W of Coal Mine all year); Ex. 22 (John Talashoyiwma, vicinity of Coal Mine, all year). However, these Hopis would have grazed throughout the vicinity of the locations noted: it would not be possible for an outfit's livestock to graze at "4 mile W of Coal Mine" all year; further, Nuhtayma and Talashoyiwma are listed as living "in the vicinity of Coal Mine", a broad area.

While Dr. Adams admitted that the sites identified on the northeastern part of Coal Mine Mesa (referred to a "Nanmuru") were sites at which Hopis unsuccessfully attempted dry farming, and were abandoned not later than the 1920's, 8 TT 1248 (Dr. Adams), this did not preclude Hopi grazing in the area.

117. Ex. 2676, a report dated April 16, 1937 by D.G. Anderson, Junior Range Examiner, states, "The present range use by the Hopis is Coal Mine Mesa, around the Moencopi Village, and Ward Terrace. This range is also used by Navajos."

investigation revealed a number of Navajo Camps in this area. The Court finds Camps 123[118] and

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118. *Camp 123:* Dr. Russell testified that George and Mary Bancroft, Richard and Helen Tsinnie, and children of both families had two winter sites: the first, at which there were two hogans and several corrals (Site 3-1), was 4 miles northwest of the Coal Mine. Site 3-33, about 3 miles north of site 3-1, has few remains because a son, born in 1934, died in that hogan in 1938 or 1939, which was subsequently burned. The family used the northern end of Coal Mine Mesa in the area of these sites for herding. 18 TT 2604-2617 (Dr. Russell). The January, 1935 letter listed George Bancroft living northeast of the Old Coal Mine Road. Ex. 2554 at 3.

The Hopi Tribe argues that Site 3-1, also designated as Adams' Site 86, was occupied by the Bancrofts only after the Hopis who occupied the site relocated to Adams Site 87. See 7 TT 1173-75 (Adams); Ex. 651, App. 1, Site 86. However, there is no evidence that the Hopis using this site relocated after 1934. Dr. Adams states that Site 86 was in use from the 1920's into the 1930's "circa 1934", and that the site was used only occasionally by the mid-1930's. 7 TT 1175 (Dr. Adams). Dr. Adams testified that the hogan and corrals were visible in the aerial photographs. 7 TT 1174 (Dr. Adams).

The Hopi Tribe further claims that Helen Tsinnie, a member of the Camp in 1934, never resided at Site 3-1 in 1934. In the winter of 1933, she lived with the Bancrofts at Site 3-2, and at two hogans farther east. From that site, she herded to the rim of Coal Mine Mesa, but not onto the mesa. In June 1934, after the birth of her daughter she resided with the Bancrofts at Site 3-79. In early 1935, Helen Tsinnie moved to Tuba City, and thereafter visited the Bancrofts at Site 3-1. 25 TT 3578-3595 (Tsinnie). However, when asked, "Did the Bancrofts have other homes that they used at the time that you came to live with them?", Tsinnie mentioned several hogans, including one on Coal Mine Mesa, and at other times mentioned a corral and hogan on Coal Mine Mesa. 25 TT 3585, 3589 (Tsinnie). Further, she testified that Mattie Bancroft, Mary's daughter, lived at the Coal Mine hogan right after Angela was born, in 1934. 25 TT 3593 (Tsinnie).

Dr. Russell was shown the site by the son-in-law of Mary Bancroft, and later by Richard and Helen Tsinnie, who were members of the camp in 1934. Dr.

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125[119] grazed in this area, and that Camps 41[120] and

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Russell stated that several other informants confirmed this information, and the structures were typically Navajo. 18 TT 2609 (Dr. Russell).

The Hopi Tribe also argues that William Numkena testified that although he regularly helped his uncles farm in the vicinity of Site 3-1, he did not see a hogan in that area until aft he returned home from Phoenix Indian School in 1936. See 30 TT 4200-01 (Numkena).P However, the testimony regarding where his uncles farmed was not specific enough to tell if Numkena would have seen the hogan.

The Court finds that the Bancroft camp was located in this area in 1934.

119. *Camp 125:* Dr. Russell testified that Henry Billy herded his sheep on the Coal Mine Mesa during the summer in 1934. 18 TT 2619-22 (Dr. Russell).

The Hopi Tribe argues that his use of northern Moenkopi Plateau and Coal Mine Mesa was limited to short periods when water sources failed in his customary use area to the south. 30 TT 4183 (Billy). However, it appears that much of summer of 1934 was spent in this area, and the Court finds that Henry Billy was located in this area.

120. *Camp 41:* Dr. Russell testified that Jake Saganitso and his family resided in the area of Greasewood Lake, and farmed in Kerley Valley. The family used Coal Mine Mesa as a winter residence both before and after 1934 (though they did not live there in 1934), and as a grazing area in 1934. 17 TT 2561-63 (Russell). A government letter dated January, 1935, lists three Navajo families living northeast of the Old Coal Mine Road: George Bancroft, Adolph Maloney, and Sagenetso [Saganitso]. E. 2554 at 3.

The Hopi Tribe argues that there is no evidence that this Camp used that part of Coal Mine Mesa inside the exclusive use area in 1934. Dr. Russell did not identify a specific site, and Victor Saganitso testified at trial about two

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60 [121] did not. The Court find that Coal Mine Mesa was jointly used.

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residences "east of Coal Mine", which the Hopi Tribe argues are probably outside the exclusive area. 24 TT 3493-94 (Dr. Russell). Further, the Hopi Tribe argues that Saganitso was not able to testify what happened in 1934, because he testified that the goat reduction, the primary event Dr. Russell used to orient his informants, occurred between 1938 and 1946. 24 TT 3489-90 (Saganitso).

The Court finds that Camp 41 did not live or graze within the Hopi claimed exclusive area in 1934.

121. *Camp 60:* Dr. Russell testified that Camp 60 consisted of several families, including Adolph Maloney, a Vice-Chairman of the Navajo Tribe in the 1950's, and his mother Belle Maloney. In 1934, Adolf Maloney and his immediate family resided in Tuba City. Belle Maloney resided north of the Coal Mine at Site 3-46 (outside of the exclusive use area), and at Site 3-47 on Coal Mine Mesa, for which there are no remains. From Site 3-47, the family would herd on Coal Mine Mesa and into Hollow Place. 18 TT 2581-84 (Russell). A government letter dated January, 1935, lists three Navajo families living northeast of the Old Coal Mine Road: George Bancroft, Adolph Maloney, and Sagenetso [Saganitso]. Ex. 2554 at 3.

The Hopi Tribe argues that there is insufficient evidence that Camp 60 resided or grazed on Coal Mine Mesa in 1934. First, Dr. Russell testified that Camp 60 lived on Coal Mine Mesa for about five years in the 1930's, then returned to its customary use area around Red Lake (20 miles northeast of Moenkopi). 22 TT 3197-3201. Further, Adolph Maloney testified at deposition in 1983 that his family resided, farmed, and grazed their livestock near Red Lake in 1934, and that while driving across Coal Mine Mesa in 1934, he saw some Navajos living near Coal Mine Canyon, but did not know who they were. 30 TT 4143-59 (Maloney). Although the Hopi Tribe acknowledges that Camp 60 lived on Coal Mine Mesa at some time prior to 1935 due to the government letter cited above, it argues, "the occupation was plainly not of sufficient duration or

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Appendix B

8. *Moenkopi Wash/Kerley Valley*

The preponderance of the evidence supports a finding that both Hopis and Navajos grazed in the Moenkopi Wash/Kerley Valley area, east of the Village of Moenkopi. There was testimony that Hopis primarily grazed southeast and east of the Village,[122] and that Navajos primarily grazed east and northeast

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importance to have impressed itself upon Mr. Maloney's memory." (Navajo response at 56). Further, the area northeast of the old Coal Mine Road, includes land within and outside of the exclusive use area.

The Court finds that the Adolph Maloney family did not live and graze within this area in 1934.

122. Roger Nasevaema testified at trial that he helped Naseyawma herd about 80 sheep, in a southeasterly direction from the Village on the far side of Moenkopi Wash. 2 TT 275 (Nasevaema).

Ira Naseyouma testified at deposition that his father and Siletstiwa had a sheep corral on the south side of the Village and the wash, and a second sheep corral in 1934 at Moenkopi bridge. 10 TT 1592 (Deposition of I. Naseyouma). Pongyangoytiwa (Palmer) kept his sheep at a corral just west of the first corral. 10 TT 1590-92 (Deposition of I. Naseyouma). Although Ira Naseyouma had an eye operation in 1934 that required him to spend several months in the hospital and at home, 11 TT 16992 (Deposition of I. Naseyouma), his account of grazing *near* Moenkopi is credible.

Guy Naseyouma testified at deposition that he had a horse corral in the village, and that these horses would graze in the taatoq (southeast) direction from the village. 11 TT 1808 (Deposition of G. Naseyouma).

See also, 7 TT 1154-1165, 1179-80 (Dr. Adams) (Site 157, 115, 116, 117,
(Cont'd)

of the Village [123] from the Standing Big Tree area (Camps 44,[124] 173,[125] and 242 [126]).

(Cont'd)
118, 108, 109, 110, 111, 112, 114, and 124 Hopi sheep corrals used by the "Big Phillip" outfit; Site 82, sheep corral used by Palmer Accowsie; Site 113 used by Gaseoma; Site 130 used by Jackson Tewa (not depicted on Hopi Ex. 703A); Sites 90, 120, 139, community corrals).

123. Although Dr. Adams concluded that several rock sheep corrals along the southern wall of Moenkopi Wash east of the Village must have been Hopi enclosures, Adams admitted that rock construction "in and of itself would not rule out use by Navajos" 7 TT 1100-01 (Dr. Adams), and Navajo hogan remains are found in that area, one of which is next to a stone corral. 7 TT at 1154-55, 1276-78 (Dr. Adams).

124. *Camp 44:* Jake Bracker and his family had primary summer residence and field at Site 3-72, at Standing Big Tree. The family herded in all directions, north and south of Moenkopi Wash. 17 TT 25665. The Camp was related to Camp 173, and the Hopi Tribe's arguments are addressed with regard to Camp 173.

125. *Camp 173:* Dr. Russell testified that Joe Notooth and his family had two primary farming areas. One was at Standing Big Tree, residence site 3-70 and a field area about a quarter mile from the residence; the line of the Hopi proposed "exclusive use area" goes through this field. The family also had a corral, site 3-71 associated with the residence site. 18 TT 2648 (Dr. Russell). Although the LMU3 Range Management Report, Ex. 3175, places Joe Notooth at "Greasewood Valley", the Hopi Tribe admitted that Notooth's primary residence and grazing area was in Standing Big Tree and that Camp 173 would have passed through the exclusive area in its travel between Standing Big Tree and the southern Moenkopi Plateau.

126. *Camp 242:* Lee Phoenix and his family had a summertime residence and corral at Site 3-71 and 3-74, at Standing Big Tree. Although no members of

(Cont'd)

Appendix B

9. *North of Moenkopi Wash*

The Hopi Tribe introduced limited testimony that Hopis grazed their livestock north of Moenkopi Wash, including around Red Lake, Middle Mesa, and Wildcat Peak.[127] However,

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(Cont'd)
this Camp were living who resided there in 1934, or were too young in 1934 to provide reliable evidence, Dr. Russell opined that this Camp grazed on both the north and south sides of the Moenkopi Wash. 18 TT 2691-93 (Dr. Russell). The Hopi Tribe did not challenge the location or suggested grazing area of this Camp.

127. Roger Honahni testified that he and Lahongva, Kuwanhaptewa, and Milo Tewa ran stock in the area from Moenkopi Village east to the Middle Mesa area. 3 TT 358, 367 (Deposition of Roger Honahni). Honahni testified that Gaseoma, Siletstiwa, Wesley Seguiva, Teddy Tomosie, Talesmaenewa, Naseyouma, Phillip Pongyowyma and his children, and Logan Loma grazed sheep beyond Moenkopi Canyon (Moenkopi Wash) to the north. 3 TT 401 (Deposition of R. Honahni). Pongyagoitewa, Seweyumptewa, Danakhoinewa, Naseyowma, Lomaquaptewa, Kelhongnewa, Sewiltima, Natwantewa herded their sheep up to Red Lake, Middle Mesa, and Pasture Canyon. 3 TT 402-05 (Deposition of R. Honahni). Further, Honahni testified that horses would graze up to the west side of Middle Mesa. 3 TT 308 (Deposition of R. Honahni).

Ira Naseyouma testified that his father had a number of sheep corrals: one was on the old road to Oraibi (which he didn't use much), about five miles east of where the present rest area is located. 10 TT 1598-99 (Deposition of I. Naseyouma). Ira Naseyouma also testified his father and Kyarsyawma's father had winter sheep corrals north of Tuba City, west of Tutukwiwya, and would graze west to Moenave, south to Highway 89, north to Yuvuqpu, and east to Tepqolo (south of Pikyáingwtsomo, or Wildcat Peak). The men also had winter sheep corrals by Wildcat Peak, and would graze southeast to Red Lake, west to Pasture Canyon, but would not graze north far. 10 TT 1593-98, 1679-87 (Deposition of 1. Naseyouma). Guy Naseyouma testified that Kyarsyawma
(Cont'd)

no government document of the period mentions Hopi grazing in this area,[128] and Navajo testimony showed there was little, if any, Hopi grazing here.[129] The Court finds that Hopis did not graze

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corraled his sheep between Pasture Canyon and the village, 11 TT 1833 (Deposition of G. Naseyouma), inconsistent with Ira Naseyouma's testimony. Further, as noted previously, Ira Naseyouma had an eye operation in 1934 that required him to spend several months in the hospital and at home, 11 TT 1690-92 (Deposition of I. Naseyouma), lending his account of where sheep were grazed in 1934 implausible. Further, Ira Naseyouma's testimony that he herded his father's sheep from Pasture Canyon to Wildcat Peak is contradicted by his brother, Guy Naseyouma, who testified that his father's sheep were not grazed in the Pasture Canyon area until after 1937, and did not mention grazing his father's sheep in the Wildcat Peak area. Guy Naseyouma's testimony was corroborated by Roger Nasevaema, who lived with Ira and Guy's father, Naseyawma, in 1936, who testified that he grazed the sheep southeast from the village on the far side of the wash. 2 TT 263-64 (Nasevaema).

See also, 10 TT 1520 (Dr. McCawley) (Preston Mesa, Middle Mesa was "maximum likelihood Hopi use area" based on forage and water availability).

128. The LMU1 Range Management Report, Ex. 3098 at 46-47, did not mention Hopi livestock owners.

129. Keith Lane, a Navajo who grazed livestock in the Wildcat Peak area in the 1930's, testified that he did not see any Hopis grazing livestock around Wildcat Peak, Gopher Springs, or Middle Mesa in the 1930's. 26 TT 3705-06 (Lane). Richard Butler, who lived and grazed livestock north and northeast of Pasture Canyon during the 1930's, testified that he did not see any Hopi livestock in that area, including at Preston or Red Mesa, Dogwater or Dog Springs, White Point, Echo Cliffs, or north of Tuba City. 25 TT 3618-19, 3627-28 (Butler). Victor Saganitso, who lived and raised livestock in the Greasewood area during the 1930's testified that he did not see any Hopis in that area. 24 TT 3491-93 (Saganitso). Percy John also testified at deposition that he did not see any Hopis grazing livestock north of Tuba City, around Pasture Canyon or at Greasewood Lake. 26 TT 3756 (Deposition of P. John).

their livestock north of Moenkopi Wash (except in Pasture Canyon, as previously discussed).

IV. *Other Hopi Uses*

The Hopi Tribe also claims an interest in the 1934 Reservation based on the location of traditional Hopi activities, such as eagle gathering, visiting shrines, gathering ceremonial plants, ceremonial hunting, gathering edible plants and pinon nuts, gathering medicines, collecting plant materials for tools and crafts, gathering fuelwood and construction wood, subsistence hunting and mineral gathering.

Religious activities

The Hopi Tribe explains that for centuries, the gathering of live young eagles has been a fundamental aspect of Hopi religious life. Eagle gathering is conducted annually in the spring. Preliminary trips to check on the eagle nests are made; eaglets are then gathered live when they are at the appropriate age. Offerings are made at eagle shrines within the gathering areas, and the eaglets are transported back to the Hopi villages where they are cared for as members of the clan of the eagle gatherers until midsummer when they are sacrificed. The eagle gathering areas are divided among Hopi clans, generally on the basis of the route taken by the group during its migration to the Hopi mesas. Expert and lay testimony and historical documents were introduced regarding the practice of eagle gathering and the areas in which eagles were gathered.[130]

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130. 1 TT 102-18, 124-27 (Peter M. Whiteley); Ex. 659, p. 69-74 (Whiteley report); 12 TT 1895-1904 (Allan D. Ainsworth); Ex. 655, 76-84, 95

(Cont'd)

Appendix B

The Hopi Tribe also claims rights to the 1934 Reservation based on the existence of religious shrines and sacred places throughout the Reservation.[131] These shrines are particular locations visited in connection with religious ritual, and are generally marked by rock cairns, petroglyphs, or hidden depositories for offerings. Religious leaders make pilgrimages seasonally, annually, or periodically in connection with certain events. There were substantial expert and lay testimony and historical documents introduced demonstrating the importance of these shrines to the Hopi people and the location of some of these shrines.[132]

Further, Hopis gathered plant materials, such as fir boughs and wild tobacco, for use in annual ceremonies. The plants

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(Ainsworth report); 2 TT 226-31 (Joshevaema); 2 TT 246-56 (Lomayaktewa); 2 TT 265-75 (Nasevaema); 6 TT 862-64 (Hamana); 6 TT 1010-13 (Humetewa); Ex. 736, p. 373-85 (deposition of Ira Naseyouma); Ex. 115, H.R. Voth, "Notes on the Eagle Cult of the Hopi" (1912); Ex. 404, Earnest Beaglehole, "Hopi Hunting and Hunting Ritual" (1936). Ex. 714, Att. 3, depicts these eagle gathering areas.

131. Many of these places have religious significance to the Navajos as well.

132. 1 TT 71-87, 111-13, 121-124 (Peter M. Whiteley); Ex. 659, p. 1-39, 58-74 (Whiteley report); Ex. 715, Map 2 (Map binder accompanying Whiteley report); 8 TT 1202-08 (Adams); Ex. 651, p. 99-102, App. I Sites 84, 107, 147, 154, 155 (Adams report); Ex. 655, p. 76-84, 95 (Ainsworth report); 2 TT 217-31 (Joshevaema); 2 TT 252-54 (Lomayaktewa); 2 TT 274 (Nasevaema); 3 TT 405, 411-13 (Honahni); 6 TT 884-913 (Hamana); 6 TT 935-36 (Numkena) 12 TT 1904-06 (Ainsworth); Ex. 310 (Letter from Colton to Scattergood, 6/10/32); Ex. 345 (Letter from Edgar K. Miller to CIA, 6/28/33). The approximate location of many shrines within the 1934 Reservation are depicted on Ex. 715, Map 2.

gathered, their locations, and the journeys to gather the plants have religious significance.[133]

Hopis also hunted rabbits, foxes, coyotes, and deer for ceremonial purposes.[134]

25 U.S.C. § 640d-20 guarantees the use and right of access to Hopi religious shrines if they are located on the Navajo reservation after partition. That section states:

> Notwithstanding anything contained in this subchapter to the contrary, the Secretary shall make reasonable provision for the use of and right of access to identified religious shrines for the members of each tribe on the reservation of the other tribe where such use and access are for religious purposes.

Given that access to religious shrines will be protected, the Hopi Tribe cannot persuasively argue that their presence gives the Hopi Tribe a property interest as such in the 1934 Reservation.[135]

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133. 1 TT 109-11 (Whiteley); 3 TT 413-20 (Roger Honahni); 6 TT 941-42 (Numkena); 6 TT 1006-09 (Humetewa); 12 TT 1904-06 (Ainsworth); Ex. 655, p. 32-35, 95, App. 3, Table 6 (Ainsworth report); Ex. 659, p. 58-68, 75-83 (Whiteley report). The areas in which plants were gathered are depicted in Ex. 704, Att 4.

134. 1 TT 109-11 (Whiteley); 3 TT 437-43 (Roger Honahni); 6 TT 1014-16 (Humetewa); 12 TT 1906-08 (Ainsworth); Ex. 655, p. 65-73, 94, App. 3, Table 16 (Ainsworth report); Ex. 659, p. 58-68, 75-83 (Whiteley report). Areas used by Hopis in 1934 for ceremonial hunting are depicted on Ex. 704, Att. 5.

135. Eagle gathering areas arguably qualify as religious related sites for (Cont'd)

Further, this Court has previously held that religious interests in land held in trust for another Indian Tribe do not create a property interest in that land. In *Manybeads v. United States*, 730 F.Supp. 1515 (D.Ariz.1989) (appeal pending), this Court held that individual Navajos did not have a First Amendment right to remain on property held in trust by the United States for the Hopi Tribe. This holding was dictated by the opinion in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988), in which the Supreme Court had held that, in essence, "[t]he nature of the religious rights claimed cannot create a de facto beneficial ownership of public (or private) property, in order to practice ones religion." *Manybeads v. United States*, 730 F.Supp. at 1517; *see also, Attakai v. United States*, 746 F.Supp. 1395 (D.Ariz.1990).

The Hopi Tribe does not contend that it derives an interest in the 1934 Reservation due to the First Amendment rights or religious interests *per se*. Instead, the property interest claimed by the Hopi Tribe results from the "occupation, use and possession" for religious purposes of Hopi Indians on the 1934 Reservation. However, a holding that *religious* use is sufficient to create a property interest for the Hopi Tribe (and thus divest the Navajo Nation of its "residual" property interest in the 1934 Reservation) would directly contradict *Lyng*. Thus, the Hopi Tribe claims in the 1934 Reservation based on the eagle gathering activities, visiting shrines, and gathering of ceremonial plants and animals are not sufficient "occupation, use and possession" to establish a property interest for exclusive use or partition purposes.

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access by Hopi clan members. In this regard, the Court expresses no opinion respecting any regulations concerning capture of eaglets by either Tribe.

Further, the Hopi Tribe has not demonstrated that these activities were of the intensive nature necessary to create a property interest under the Act. Eagle gathering occurred only once a year, with only a small number of men involved.[136] The Hopi Tribe failed to demonstrate that a substantial number of Hopis travelled to shrines outside of the immediate vicinity of the Hopi villages in the 1930's,[137] and many of the shrines are often only known to a small number of Hopis.[138]

Moreover, the evidence presented at trial reflects that ceremonial plant gathering was sporadic and at irregular intervals,[139] and that most gathering occurred around the vicinity Moenkopi, off-reservation at San Francisco Peaks, or inside the 1882 Reservation.[140]

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136. Ex. 721 at 101-02; 255 (Deposition of Starlie Lomayaktewa) (eagles gathered only once a year; six men usually involved); 2 TT 230 (Josheveama) (same); 3 TT 460-61 (Deposition of R. Honahni) (two to three men involved); 1 TT 161-62 (Dr. Whiteley) (six or seven people involved). Further, the eagle-gathering trips would last only one to three days. 3 TT 461 (Deposition of R. Honahni) (would come back the same day if not too far).

137. 1 TT 166 (Dr. Whiteley) (not aware of any pilgrimages made of the Tutskwa boundaries before the 1970's).

138. 1 TT 154 (Dr. Whiteley) (conceding).

139. 6 TT 980-81 (Numkena) (it took about six hours to get fir boughs in the San Francisco Peaks; women gathered yucca in the spring, which only took a couple of hours; ceremonial materials were gathered once a year).

140. Pine, cedar, spruce, and materials for kachina costumes were gathered at San Francisco Peaks. 6 TT 941, 980 (Numkena); Ex. 732 at 113-15 (Cont'd)

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Ceremonial hunting was also not of the intensive nature necessary to create a property interest. By 1930, Moenkopi Hopis were no longer hunting foxes and coyotes,[141] and deer were almost extinct in LMU3.[142]

Non-religious activities

Hopis gathered various edible plants to add to their diet in 1934, including greens, herbs, vegetables, fruits, seeds and berries. A number of witnesses testified regarding where plants were gathered.[143] However, Hopi plant gathering outside the immediate vicinity of Moenkopi was not sufficiently intensive to give rise to a property interest: the evidence shows that most of the plant gathering took place close to Moenkopi and that gathering outside of this area was irregular and often depended on where a person was traveling.[144]

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(Deposition of J. Humetewa); 3 TT 417 (Deposition of R. Honahni). Yucca was gathered within three miles south of the Village of Moenkopi. 6 TT 942 (Numkena). Tobacco was found inside the 1882 Reservation. 3 TT 414 (Deposition of R. Honahni).

141. 3 TT 442-43 (Deposition of R. Honahni)

142. 13 TT 2014 (Dr. Ainsworth) (agreed that few, if any, deer on the 1934 Reservation by 1900).

143. 3 TT 416-17 (Deposition of R. Honahni): 6 TT 1031-33 (Deposition of J. Humetewa); 11 TT 1752-57 (Deposition of R. Lomayesva); 12 TT 1835-38 (Deposition of G. Naseyouma); 12 TT 1913-16 (Dr. Ainsworth); Ex. 655, p. 12-22, 89-90, App. 3, Table 1 (Ainsworth report). The areas in which Hopis gathered edible plants are depicted on Ex. 704, Att. 8.

144. 6 TT 1031-33 and Ex. 732 at 105, 111, 119, 120-21 (Deposition of J.
(Cont'd)

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Also, Hopis gathered pinon nuts annually to supplement their diet.[145] However, the gathering of pinon nuts is not sufficient to create a property interest: they were generally gathered only once a year, and because pinons ripen in an area only once every five to seven years, Hopis went to different places every year. Further, Dr. Ainsworth admitted that pinon nuts were rarely found and "unusual" in the Hopi diet.[146]

The Hopi Tribe also contends that Hopis gathered medicinal plants circa 1934.[147] Again, this practice is not sufficient to create a property interest in the area.

The Hopis also collected materials for tools and crafts, including reeds, grasses, and yucca to make baskets, plaques, and bridal "suitcases". Weaving tools, hunting sticks, and bows and arrows were made from oak, mountain mahogany,

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Humetewa) (gathered duitsma [an herb] around Moenkopi; gathered quiva along Moenkopi Wash; gathered spinach along the Moenkopi Wash farming area; wild tea, south of Moenkopi at Hollow Place [the Bakalo]); Ex. 736 at 812-22 (Deposition of I. Naseyouma) (did not gather wild plants every year); 3 TT 4117 (Deposition of R. Honahni) (collected greens if happened to be out on the range: "We don't go any particular direction or place to gather this").

145. 6 TT 1013 (Deposition of J. Humetewa); 12 TT 1916-18 (Dr. Ainsworth); Ex. 655, p. 22-23, 90, App. 3, Table 2 (Ainsworth report). The areas where pinon nuts were gathered in 1934 are depicted on Ex. 704, Att. 9.

146. 12 TT 1916-17 (Dr. Ainsworth).

147. 3 TT 417-418 (Deposition of R. Honahni); 12 TT 1918-20 (Dr. Ainsworth); Ex. 655, p. 31-32, 91, App. 3, Table 5 (Ainsworth report). The area in which medicinal plants were gathered is depicted on Ex. 704, Att. 12.

ironwood, and greasewood, and kachina (or "katsina") figures and other ritual objects were made from cottonwood roots.[148] Again, the evidence demonstrates that this use was not sufficiently intensive to create a property interest. Bows and arrows were no longer used for hunting in 1934, but for gifts, and some tourist trade.[149] Yucca was only gathered in the spring, generally within 3 miles of Moenkopi,[150] and cottonwood was generally "fished" out of streams after storms, rather than cut down.[151]

The Hopis also gathered firewood for cooking and heating at great distances from their villages, since firewood had become scarce within the Reservation by 1934.[152] However, it appears from the evidence that wood gathering inside the 1934 Reservation was waning in 1934, and that most took place in the 1882 Reservation.[153] Further, Hopis often used alternative forms

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148. 3 TT 416 (Deposition of R. Honahni); 11 TT 1757-60 (Deposition of R. Lomayesva); 12 TT 1924-34 (Dr. Ainsworth); Ex. 655, p. 23-31, 35-37, 90-92, App. 3, Tables 3, 4, 7, 8, 9 (Ainsworth report). The areas in which these materials were gathered are depicted on Ex. 704, Att. 10, 11, 17, 18, and 19.

149. 12 TT 1933-34 (Dr. Ainsworth).

150. 6 TT 941-42, 981 (Numkena).

151. 12 TT 1928-29 (Dr. Ainsworth).

152. 3 TT 315-20 (Deposition of R. Honahni); 6 TT 1002-05 (Deposition of J. Humetewa); 13 TT 2067 (Deposition of A. Honahni); 12 TT 1927, 34-36 (Dr. Ainsworth); Ex. 655, p. 29-31, 37-43, 92-93, App. 3, Table 10 (Ainsworth report). Ex. 704, Att. 14 depicts wooded areas where Hopis gathered firewood.

153. 7 TT 1049-51 (Deposition of J. Humetewa) (stopped getting wood at

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of fuel, such as brush, greasewood, and corncobs from Hopi fields.[154]

The Hopis also gathered construction wood to build their homes, kivas, and corrals.[155] Again, the evidence shows that most wood was not obtained on the 1934 Reservation due to the severe depletion, but in the Flagstaff/San Francisco Peaks area.[156] The limited wood gathering that occurred is not sufficient to create a property interest in the 1934 Reservation.

The Hopis also hunted small game for subsistence, including rabbits, squirrels, prairie dogs, and quail.[157] Evidence indicates, however, that by 1934, rabbits were the only wild

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Gap and Wildcat by 1936 and went instead to the 1882 Reservation); 3 TT 317-19 (Deposition of R. Honahni) (gathered fuelwood at Black Mount in 1882 Reservation).

154. 12 TT 1937 (Dr. Ainsworth).

155. 3 TT 312-15 (Deposition of R. Honahni); 12 TT 1937-38 (Dr. Ainsworth); Ex. 655, p. 43-44, 93, App. 3, Table 11 (Ainsworth report). The areas in which wood was gathered is depicted on Ex. 704, Att. 16.

156. Ex. 3176 at 47-48 (LMU3 Woodland Survey Report) ("accessible wooded areas have been severely cut and depleted); 3 TT 313, 446 (Deposition of R. Honahni).

157. 3 TT 437-41 (Deposition of R. Honahni); 6 TT 1014-16 (Deposition of J. Humetewa); 13 TT 2048-49 (Deposition of A. Honahni); 12 TT 1920-24 (Dr. Ainsworth); Ex. 655, p. 65-73, 94-95, App. 3, Table 17 (Ainsworth report). The hunting area is depicted on Ex. 704, Att. 13.

game hunted by the Hopis, and many rabbits were found in the Moenkopi vicinity.[158]

Finally, the Hopi Tribe also claims that Hopis gathered mineral resources, such as stone, coal, clay, and pigments for construction, fuel, tools, and religious uses.[159] However, the Hopi Tribe did not demonstrate that Hopis went out of the Moenkopi area to gather such materials with any regularity.[160]

Dr. Ainsworth admitted on cross-examination that he did not intend that *all* of the area indicated on his maps were used by Hopis for these purposes; the maps do not indicate specific areas of use, but only broad general areas representing use.[161] Dr.

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158. 3 TT 437-38, 443 (Deposition of R. Honahni); 6 TT 1014-16 (Deposition of J. Humetewa).

159. 3 TT 312-13, 420-23, 443-46 (Deposition of R. Honahni); 6 TT 942-43, 978 (Numkena); 6 TT 1009-10, 1020-22 (Deposition of J. Humetewa); 8 TT 1198-1201 (Dr. Adams); Ex. 651, p. 102-03. App. 1 (Adams report); 12 TT 1937-40 (Dr. Ainsworth); Ex. 655, p. 74-75, 85-86, 96, App. 3, Table 18, 19, 21 (Ainsworth report). The areas are depicted on Ex. 704, Att. 15.

160. "Duma", or white clay, was gathered for ceremonial purposes only once a year. 6 TT 981 (Numkena). Stone was quarried very near the Village of Moenkopi. 3 TT 313, 422-23 (Deposition of R. Honahni). Other materials were gathered in the 1882 Reservation, 6 TT 943 (Numkena) (gathered "tuuma" in the 1882 Reservation); and coal was often purchased from local traders. 3 TT 459 (Deposition of R. Honahni).

161. 12 TT 1892 (Dr. Ainsworth) ("people talk generally about areas. They would give a place name and say that general area"); ("Their representations were general use patterns, based on the best of my ability to place the areas on the map"). *See also* 13 TT 2016-17 (Dr. Ainsworth).

Ainsworth's testimony is therefore not sufficient to establish how intensive any of the above uses were in 1934, and the Hopi Tribe may not assert rights and interest in the 1934 Reservation on that basis.

CONCLUSIONS OF LAW

This Court has jurisdiction pursuant to the Navajo-Hopi Settlement Act, 25 U.S.C. § 640d-7, 88 Stat. 1715 (1974), as amended, 94 Stat. 929 (1980).

The Act of June 14, 1934, 48 Stat. 960 (1934) (the "1934 Act), conveyed an equitable interest in certain of these lands to the Navajo Nation and "such other Indians as may already be located thereon", including the Hopi Indians.[162]

Certain lands within the boundaries of the 1934 Reservation are excluded from litigation and thus not subject to the claims of the Hopi Tribe, including the 1882 Reservation, certain lands previously reserved by Congress for water power purposes and power sites, lands reserved by the 1868 Treaty with the Navajo Nation, 15 Stat. 667, lands withdrawn by the Act of May 23, 1930, 46 Stat. 378, lands withdrawn by the Act of February 21, 1931, 46 Stat. 1204, allotted lands for which patents issued, lands purchased on behalf of the Navajo Nation, privately owned lands relinquished pursuant to Section 2 of the 1934 Act, and lands conveyed to the State of Arizona for the "support of the common schools" which were surveyed prior to withdrawal of the land pursuant to Executive Order. The location of these "excluded" lands has not been established; in Phase II of this

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162. "Such other Indians" also include the Paiute Tribe, for which the Court will issue separate findings and conclusions.

litigation regarding partition, the parties will have the opportunity to present evidence regarding the location of these lands.

All other lands, including allotted lands for which patents did not issue, and "school lands" which were unsurveyed or surveyed after withdrawal of the land pursuant to Executive Order, are subject to Hopi claims.

The Court finds that in order to meet the statutory criterion of "already located thereon", the occupation, possession, and use by Hopi Indians must be substantial and sufficiently intensive in order to create a property interest in the 1934 Reservation. Use by a few isolated individuals, especially when away from traditional use areas of that individual's Tribe, and irregular or sporadic uses are not sufficient. Substantial seasonal use is sufficient for this Court to find occupation or use of the land.

The gathering of eagles, visitation of shrines, and gathering plants and animals for religious purposes do not give rise to a property right under the 1934 Act. The Hopi Tribe's privilege of access to such shrines is protected by 25 U.S.C. § 640d-20.

The burden of proof is on the Hopi Tribe to demonstrate where Hopi Indians were "located" in 1934, although less stringent than in ordinary civil proceedings, due to the passage of more than fifty years between the events to be proved and trial and the lack of a written Hopi language. *See United States v. State of Washington*, 730 F.2d 1314, 1317 (9th Cir. 1984) (standard of proof relaxed when little documentation is available for proving the existence of Indian fishing grounds).

After the areas on which Hopi Indians are located are

identified, "Navajo interests are identifiable as the residue." *Sekaquaptewa II*, 619 F.2d at 808. Thus, this Court need only address Navajo use of lands on which the Hopi Tribe has proved Hopis were "located" in 1934, in order to decide whether Hopis were "exclusively" or "jointly" located on that land.

The Hopi Tribe, for the use and benefit of its individual members, and subject to the paramount title of the United States, is entitled to an exclusive interest in both the surface and subsurface estate in those lands which were exclusively used, occupied, or possessed by Hopis in 1934.

The Hopi Indians were exclusively located in the following area: (1) the Village of Moenkopi, (2) Moenkopi Wash/Kerley Valley in the areas designated as upstream from the present Highway 264 bridge, downstream from the present Highway 264 bridge (except Navajo patented allotments), and south of the Wash between Moenkopi and the "old Hopi bridge" at the western end of Kerley Valley, (3) the grazing areas south and southeast of Moenkopi (south of the Wash), (4) Reservoir Canyon, and (5) the central/southern Moenkopi Plateau to the southern border of the claimed Hopi exclusive use area, marked on Exhibit 703A (and not including the Bakalo or Little Bakalo). The specific areas are detailed in the Findings, above, and a map is attached depicting these areas.[163]

Upon completion of a survey of the exclusive Hopi lands by a competent surveyor appointed by the Court or by stipulation of the parties, and upon the Court's approval of that survey, title to the lands so identified shall be quieted in the Hopi Tribe, subject

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163. The attached map is not intended to reflect the precise boundaries of the exclusive and joint use areas.

to the trust title of the United States, and all such lands shall be a part of the Hopi Reservation.

Pursuant to 25 U.S.C. § 640d-16, nothing in this action affects the title, possession, and enjoyment of lands heretofore allotted and patented to individual Indians. Any Navajo individuals residing on such allotments within the area determined to be exclusively Hopi (or within that area partitioned to the Hopi Tribe in later proceedings) shall be subject to the jurisdiction of the Hopi Tribe. Similarly, any Hopi individuals residing on such allotments within the area determined to be exclusively Navajo (or within the area partitioned to the Navajo Nation in later proceedings) shall be subject to the jurisdiction of the Navajo Nation.

The lands jointly used by Navajos and Hopis in 1934 are subject to partition in the second phase of trial proceedings. Navajo and Hopi Indians were jointly located in the following areas: (1) Moenkopi Wash/Kerley Valley in the areas designated as north of the Wash and south of the old Tuba City-Cameron road, between the government farm on the east and the old Hopi bridge on the west, and north of the old Tuba City-Cameron road, (2) the grazing areas east of Moenkopi (north of the Wash), (3) Pasture Canyon, (4) southern Moenkopi Plateau, south of the Hopi exclusive area border, depicted on Ex. 703A, throughout Buck Pasture to Hukvahklo, (5) the Bakalo, (6) Coal Mine Mesa, (7) Ward Terrace, and (8) the western and northern Moenkopi Plateau. The specific areas are detailed in the Findings, above, and a map is attached depicting these areas.[164]

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164. The attached map is not intended to reflect the precise boundaries of the exclusive and joint use areas.

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The Navajo Nation, subject to Paiute claims, and for the use and benefit of its individual members, has an exclusive interest in both the surface and subsurface estate of lands, subject to the paramount title of the United States, outside the Hopi exclusive area and not subject to partition.

In the partition phase of these proceedings, the Court will receive and consider all relevant evidence, and enter findings and conclusions, relating to division of property found to be jointly occupied in 1934.

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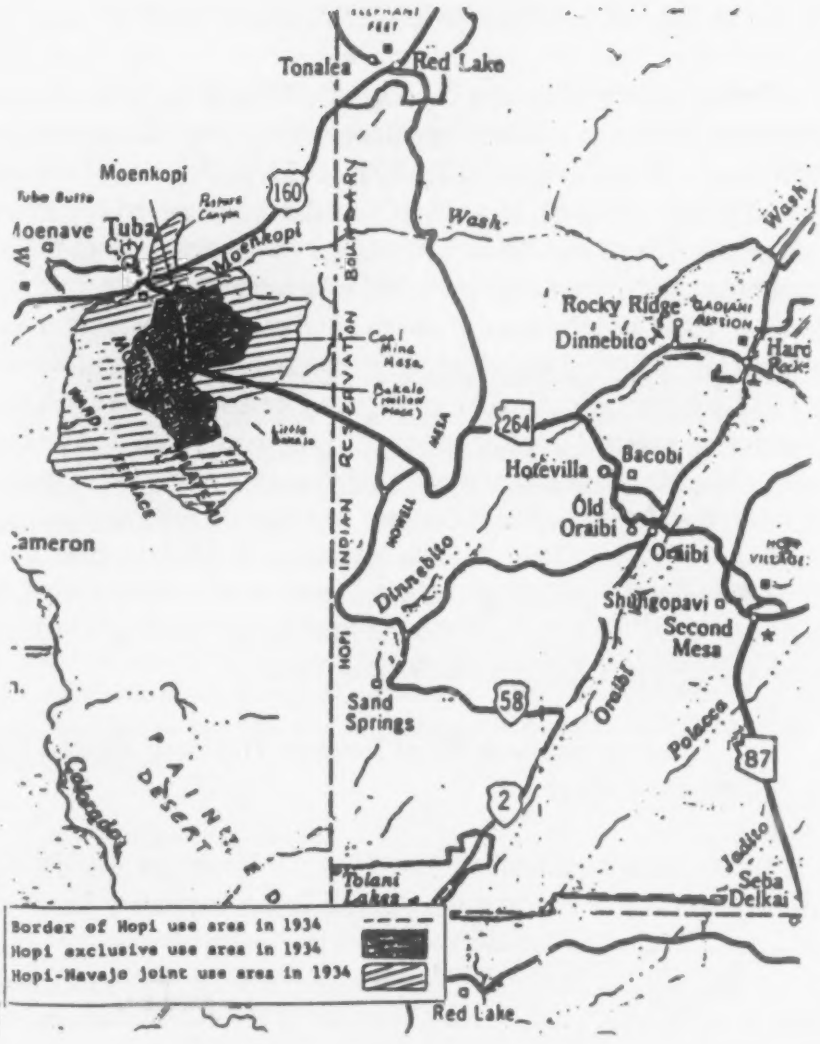

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Appendix B

ORDER AMENDING FINDINGS OF FACT

On April 27,1992, this Court issued Findings of Fact and Conclusions of Law ("Findings") regarding Hopi claims to the 1934 Reservation.[1] On May 22, 1992, the Hopi Tribe and Navajo Nation filed simultaneous briefs and maps regarding their interpretations of the Court's Findings with regard to specific boundaries for the area found to have been exclusively used by Hopis in 1934 and the area found to have been exclusively used by Hopis in 1934 and the area jointly used by Navajos and Hopis in 1934.[2] Although this Order will not delineate the specific boundaries for the "exclusive" and "joint use" areas, the Order will address the few areas in which there were wide differences between the Hopi and Navajo interpretations in order to narrow the issues for trial. These areas include: (1) the area between Ward Terrace, Highway 89, and the Little Colorado River, (2) southern Ward Terrace, and (3) the Moenkopi Plateau south of Buck Pasture and Hukvahklo (Windy Tank).

(1) *The area between Ward Terrace, Highway 89 and the Little Colorado River*

In its interpretation of the Court's Findings regarding grazing on Ward Terrace, the Hopi Tribe included an area

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1. This reservation was created by the Act of June 14, 1934, 48 Stat. 960 (1934) ("the 1934 Act"). The 1934 Act described the external boundaries of the Navajo Reservation, and conveyed an equitable interest in certain of these lands to the Navajo Nation and "such other Indians as may already be located thereon", including Hopi Indians.

2. The area jointly used by Hopis and Navajos in 1934 is subject to partition in "Phase II" of these proceedings; the area exclusively used by the Hopi Tribe in 1934 will become part of the Hopi Reservation when specific boundaries are established. *See* 25 U.S.C. § 640d-7(b).

bounded by Ward Terrace on the east, Highway 89 to Cameron on the west, and the Little Colorado River on the southwest. In support of this interpretation, the Hopis reference a footnote in which the Court summarized Hopi testimony that Hopi cattle grazed near Cameron and to the Little Colorado River.[3] However, this evidence is not sufficient to demonstrate substantial Hopi use of the area,[4] and the Court will exclude it from the area to be partitioned.

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3. Roger Honahni testified at deposition that a number of Hopis grazed on Ward Terrace and in the area "near Cameron", Ira Naseyouma testified at deposition that Hopi livestock grazed to Highway 89 and to the Little Colorado River, and James Humetewa testified at deposition that his cattle would go to the Little Colorado if they could not find water. (Findings, p. 1515, note 78). Of the three, only James Humetewa personally grazed his cattle in this area in 1934; his testimony established that the cattle grazed to the Little Colorado only if short on water. Further, the map drawn by Humetewa at deposition (Ex. 732A) excludes the area between Ward Terrace and Highway 89, Cameron, and the Little Colorado River. Moreover, there is no documentation of Hopi use of this area. Hopi use of this area was therefore not substantial enough to create a property interest.

4. This Court concluded:

> [O]ccupation, possession, and use by Hopi Indians must be substantial and sufficiently intensive in order to create a property interest in the 1934 Reservation. Use by a few isolated individuals, especially when away from traditional use areas of that individual's Tribe, and irregular or sporadic uses are not sufficient. Substantial seasonal use is sufficient for this Court to find occupation or use of the land.

(Findings, p. 1531).

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(2) *Southern Ward Terrace*

The Court concluded that Hopis and Navajos jointly grazed "throughout the Ward Terrace area in 1934", but did not specify the southern boundary of this area. The Hopis contend that this joint grazing area should extend across the entire Ward Terrace geographic area,[5] which extends to a line approximately parallel to the northern boundary of Wupatki National Monument. The Navajos argue for a much more limited area, following the boundaries on Ex. 703A, Hopi expert Dr. Adam's claimed "exclusive use" area map.

The Court finds that Hopis grazed on Ward Terrace south to a line parallel with the southern boundary depicted on Ex. 703A.[6]

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5. To demonstrate the extent of Ward Terrace, the Hopi Tribe attached a map on which Harold G. Bassett, Chief of the Technical Planning Section of the Rocky Mountain Mapping Center of the United States Geological Survey, had circled specific geographic features used for purposes of map labeling. (Ex. 3 to Hopi brief).

6. The Hopi Tribe introduced the deposition testimony of Roger Honahni, William Numkena, Ira Naseyouma, and James Humetewa, summarized in the Court's Findings at p. 1515, note 78.

Roger Honahni testified that a number of Hopis grazed in the area "near Cameron", but did not know how far south the cattle in this area went; Honahni did not specify what "near Cameron" meant. 3 TT 361-364.

Ira Naseyouma testified that the Dallas brothers built a house and two dams south of Secuva (a spring on Ward Terrace). However, his estimates of distance were greatly exaggerated and contradictory, and he was not consistent regarding which dam was built first, nor on their direction from the house. He also testified that the Hopi cattle grazed to Lowava (Lawava) (an area which the (Cont'd)

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The area south of this boundary will be excluded from the area to be partitioned. This Order does not establish the northern or western boundaries of the area jointly grazed on Ward Terrace. Ward Terrace is bounded on the east by the escarpment of the Moenkopi Plateau.

(3) *The Moenkopi Plateau south of Buck Pasture and Huklahklo (Windy Tank)*

The Court found that Hopis grazed on the southern Moenkopi Plateau, throughout Buck Pasture to Hukvahklo. In its

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(Cont'd)
Hopi Tribe places south of Hukvahklo, on the escarpment of the Moenkopi Plateau). 10 TT 1626-33, 11 TT 1662-67.

James Humetewa testified that he and the other members of the Dallas/ Humetewa outfit grazed far south on Ward Terrace to an area east of Black Point, as depicted on a map drawn in his deposition (Ex. 732A). 6 TT 1022-29.

None of this testimony demonstrates the intensity of grazing on southern Ward Terrace. The evidence supports substantial grazing in the area around Hopi Site 83, including Secuva and Waawala. However, there is no evidence to support the finding that grazing south of this area was more than infrequent.

The Hopi outfit grazing in this area owned between 129 and 300 cattle. 6 TT 1022-29 (Deposition of J. Humetewa) (owned 129 cattle and four horses); 10 TT 1626, 1631 (Deposition of I. Naseyouma) (Dallas brothers and Humetewa brothers owned 300 cattle "all together"); Ex. 451 at 3 (Page, *Stock Ownership-Moencopi Village*, 4/15/37) (Lomavitu list) (Hopis from Moenkopi owned 403 cattle in 1937; the Dallas group owned 55 cattle, James, Henry, and Alex "Humitewa" owned 66 cattle). The Dallas and Humetewa brothers grazed their cattle in other areas, as well, and 129-300 cattle could not have intensively used the entire Ward Terrace. Thus, this Court finds that the southern boundary is parallel to the southern boundary on Ex. 703A.

map interpreting the Court's Findings, the Hopis included the area south of Hukvahklo to the southern end of the Moenkopi Plateau, arguing that there was no physical obstruction to Hopi livestock grazing past Hukvahklo. However, only one Hopi witness testified that Hopi livestock grazed past Hukvahklo to Sand Springs on the 1882 Reservation,[7] and no other evidence supports substantial grazing in this area. Thus, the Court finds that the joint use area did not extend past Hukvahklo.

Accordingly,

IT IS ORDERED that (1) the area between Ward Terrace, Highway 89, and the Little Colorado River, (2) Ward Terrace south of the southern boundary depicted on Ex. 703A, and (3) the Moenkopi Plateau south of Buck Pasture and Hukvahklo (Windy Tank), are excluded from the area jointly used by Navajos and Hopis in 1934.

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7. James Humetewa testified that a number of Hopis grazed from the Moenkopi Plateau to Sand Springs. However, the testimony was not specific and did not establish the intensity of grazing south of Hukvahklo. Neither Roger Honahni nor William Numkena testified that grazing occurred past Hukvahklo, and Ira Naseyouma's testimony regarding a corral south of Buck Pasture was not corroborated by archeological remains, and was otherwise not credible. (Findings, p. 1521, note 106).

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED SEPTEMBER 25, 1992

Vernon MASAYESVA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, For and on Behalf of the Hopi Indian Tribe, Plaintiff,

v.

Peterson ZAH, Chairman of the Navajo Tribal Council of the Navajo Indiana Tribe, For and on Behalf of the Navajo Indian Tribe, Defendant.

Civ. No. 74-842 PCT EHC.

United States District Court
D. Arizona.

Sept. 25, 1992

Order on Motion to Alter or Amend
Judgment, Dec. 21, 1992.

Amended Final Judgment,
Dec. 21, 1992.

Order on Motion for Partial Stay
Pending Appeal, Dec. 21, 1992

* * *

Appendix C

James E. Scarboro, Alfred T. McDonnell, Mary Gabrielle Sprague, David C. Warren, James J. Tutchton, Arnold & Porter, Denver CO, W. Scott Bales, Lawrence A. Hammond, Meyer, Hendricks, Victor, Osborn & Maledon, P.A., Phoenix, AZ, for plaintiff.

Terry E. Fenzl, Craig W. Soland, John W. Rogers, Peter J. Osetek, Mary Jo Rudd, Shirley Ann Kaufman, Rebecca A. Tsosie, Brown & Bain, P.A., Phoenix, AZ, for defendant.

Kim Jerome Gottschalk, Robert Meyer Peregoy, Native American Rights Fund, Boulder, CO, for intervenors.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT RE: PARTITION OF THE 1934 RESERVATION

CARROLL, District Judge.*

I. BACKGROUND

Plaintiff Vernon Masayesva is the duly authorized Chairman of the Hopi Tribal Council of the Hopi Tribe, and appears herein as representative of the Hopi Tribe and its villages, clans and individual members. Defendant Peterson Zah is the duly authorized Chairman of the Navajo Tribal Council,

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* Kristen Rosati, the law clerk who worked tirelessly on this case and pending proceedings involving the 1882 Reservation for a full year, has honored me by her outstanding efforts in those regards. She asked for the assignment when it became available, little suspecting I am sure what it would entail. Her interest, commitment to the development of a thorough explication of the record in Phases I and II, and her thoughtful analysis of the statutes and case law, represent the best a district judge could expect of a law clerk.

and appears herein as representative of the Navajo Nation[1] and its chapters, clans, and individual members.

In 1974, the Hopi Tribal Chairman commenced this action pursuant to 25 U.S.C. § 640d-7 [2] to determine Hopi rights and

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1. The Navajo Tribal Code, 1 N.T.C. § 301, requires officials of the Navajo Tribe to use the term "Navajo Nation" rather than "Navajo Tribe". Throughout this opinion, the Court will use the term employed by the Navajos.

2. § 640d-7. *Determination of tribal rights and interest in land.*

(a) *Authorization to commence and defend actions in District Court*

Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe, is each hereby authorized to commence or defend in the District Court an action against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934, except the reservation established by the Executive Order of December 16, 1882, for the purposes of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes.

(b) *Allocation of land to respective reservations upon determination of interests*

Lands, if any, in which the Navajo Tribe or Navajo individuals are determined by the District Court to have the exclusive interest shall continue to be a part of the Navajo Reservation. Lands, if any, in which the Hopi Tribe, including any Hopi village or clan thereof, or Hopi individuals are determined by the District

(Cont'd)

interests in the reservation created by the Act of June 14, 1934, 48 Stat. 960 (1934) (the "1934 Act"). The 1934 Act described the external boundaries of the Navajo Reservation, and conveyed an equitable interest in certain of these lands to the Navajo Nation and "such other Indians as may already be located thereon."[3] The Hopis lived in the Village of Moenkopi and used adjacent areas

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(Cont'd)

Court to have the exclusive interest shall thereafter be a reservation for the Hopi Tribe. Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively.

(c) *Actions for accounting fair value of grazing, and claims for damages to land; determination of recovery: defenses* [Omitted].

(d) *Denial of Congressional interest in merits of conflicting claims; liability of United States* [Omitted].

(e) *Payment of legal fees, court costs and other expenses* [Omitted].

3. Section 1 of the 1934 Act provides: To define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes . . . the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: [legal description of land omitted]. All vacant, unreserved, and unappropriated public lands, . . . within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajos and such other Indians as may already be located thereon. . . .

in 1934, and were "such other Indians" entitled to an equitable interest in the 1934 Reservation.

This lawsuit is the second action between the Navajo Nation and the Hopi Tribe to settle title in reservation lands in northeastern Arizona. The rights of the Navajos and Hopis in a parcel withdrawn by Executive Order on December 16,1882 ("the 1882 Reservation") were previously litigated in a separate line of cases. *See Healing v. Jones,* 210 F.Supp. 15 (D.Ariz.1962), *aff'd,* 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963) (per curiam); *Hamilton v. MacDonald,* 503 F.2d 1138 (9th Cir.1974).

Healing was filed in 1958 pursuant to 72 Stat. 403, P.L. 85-547 (1958), authorizing the suit to settle title to the 1882 Reservation. A three-judge panel held that the 1882 Reservation, except for an area known as "District 6" which was exclusively occupied by Hopis, was a joint use area ("the JUA") for the Navajo and Hopi Indians. After a series of actions to enforce the Hopi Tribe's right to joint use of the JUA with the Navajo Nation, share and share alike, *see, Hamilton v. Nakai,* 453 F.2d 152 (9th Cir.1971), *cert. denied,* 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332 (1972); *Hamilton v. MacDonald,* 503 F.2d 1138 (9th Cir. 1974); *Sekaquaptewa v. MacDonald,* 544 F.2d 396 (9th Cir. 1976), *cert. denied,* 430 U.S. 931, 97 S.Ct. 1550, 51 L.Ed.2d 774 (1977), Congress passed the Navajo-Hopi Land Settlement Act, 25 U.S.C. § 640d, *et seq.,* 88 Stat. 1712, P.L. 93-531 (1974) (the "Settlement Act").

The Settlement Act authorized the District Court to partition the JUA (after a mediated negotiation effort by the Tribes), and provided for the relocation of individual Indians who lived on lands partitioned to the other Tribe. After negotiation failed, the

District Court partitioned the JUA; the partition order was final on April 18, 1979.

The Settlement Act also authorized the District Court to settle title to the 1934 Reservation. 25 U.S.C. § 640d-7. That section provided that lands in which the Court found the Navajo had exclusive interest would remain a part of the Navajo Reservation, that lands in which the Hopi had an exclusive interest would become a reservation for the Hopi Tribe, and that lands in which the Navajo or Hopi had a joint or undivided interest shall be partitioned by the Court "on the basis of fairness and equity".

On April 27, 1992, this Court issued its Findings of Fact and Conclusions of Law regarding Hopi interest in the 1934 Reservation. The Court held that the use by Hopi Indians in 1934 must have been substantial and sufficiently intensive in order to create a property interest in the 1934 Reservation. (*See* more extended discussion of what constituted sufficient occupation, possession or use in the 4/27/92 Findings.) The earlier Findings generally described the areas which the Hopis had exclusively or jointly used in 1934 based on evidence presented at the trial held between October 17,1989 and February 8, 1990 (Phase I of this proceeding).[4]

This opinion will more specifically delineate the boundaries

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4. On July 10, 1992, this Court also issued Findings of Fact and Conclusion of Law regarding claims of the San Juan Southern Paiute Tribe to the 1934 Reservation. This Court held that 25 U.S.C. § 640d, *et seq.* did not authorize a partition of land to the Paiute Tribe, and the Paiutes thus did not participate in Phase II of this litigation regarding partition. The areas which the Paiute Tribe used in 1934 do not overlap with the areas which the Hopi Tribe used in 1934.

of the area which this Court found Hopis had exclusively used, and that area found to have been jointly used by Hopis and Navajos in 1934. This Court will then partition the joint use area, based on standards explained in the next section. The Hopi exclusive use area plus the area partitioned to the Hopi Tribe from the joint use area will become part of the Hopi Reservation. 25 U.S.C. § 640d-7(b).

Trial regarding partition, or "Phase II", commenced on July 7, 1992, and continued until July 21, 1992. Both parties presented extensive evidence about the present day use by Navajos and Hopis of the area subject to partition, including residential, farming, and grazing use of the land. The parties also presented arguments regarding the appropriate standards for this Court to employ in the partition.

The Court viewed the areas involved in this proceeding on June 27, 1992, in a helicopter-ground tour arranged with the consent of the parties by Dan Jackson, Solicitor's Office, Department of Interior, Phoenix, Arizona.

The helicopter group included Craig Soland, an attorney for the Navajo Tribe, James Scarboro, an attorney for the Hopi Tribe, and Kristen Rosati, the Court's Law Clerk.

We flew over the joint use area and the Hopi exclusive use area. We were able to see the different windmills, stock tanks, grazing areas, homesites, and farming locations, as well as the physical features of the terrain. The Ward Terrace — Moenkopi Plateau escarpment, Pasture Canyon, Coal Mine Mesa, Coal Mine Canyon, Hollow Place and Little Hollow Place were all easily identified.

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A representative of each tribe joined the group for the ground tour. We travelled together in one van and essentially toured the two Bennett Freeze Administrative Units and Kerley Valley as far west as the sewer lagoons. We also drove through the Goldtooth Compound and up to the top of the Moenkopi Plateau. We could look back over Tuba City and Moenkopi Village, and locate the Government Farm and allotment lands.

All agreed that it was a Saturday well spent (and enjoyed) and provided an opportunity to see the case in a different and more understanding perspective. We are particularly indebted to Dan Jackson and the Bureau of Reclamation for the helicopter and the excellent pilot, Mark Santee.

II. STANDARDS FOR PARTITION

In general, the Hopi Tribe argues for division of the joint use area based on equality of acreage, taking into consideration the other standards provided for the partition of the 1882 Reservation, including avoiding population concentrations and establishing contiguous boundaries. *See,* 25 U.S.C. § 640d-5 (standards for partition of the 1882 Reservation). The Navajos take the position that the primary criteria should be avoiding the relocation of individuals; they also ask the Court to consider present and historical intensity of land use and the fact that Hopis have more land per capita than the Navajos, and to utilize natural topographic features to allow easy administration of boundaries.

The essential dispute between the parties is whether the partition should or must be based on equality of acreage. The following discussion will examine how the statute, legislative history, the precedent in this case, and *Healing v. Jones* and the partition of the 1882 Reservation may effect this decision.

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1. *Statutory requirements*

This Court has jurisdiction to partition jointly used lands pursuant to 25 U.S.C. § 640d-7(b):

> Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively.

The statute does not give the Court guidelines for the application of "fairness and equity".

The lack of standards in this section, as compared with section 640d-5 which listed detailed criteria for the partition of the 1882 Reservation, indicates that Congress intended to grant the Court broad discretion in the partition of the 1934 Reservation.

Further, in contrast to the partition of the 1882 Reservation, the absence of an "owelty"[5] provision suggests that Congress did not intend equality of acreage and/or value of joint use land to be mandatory in the partition of the 1934 Reservation. *See*, 25 U.S.C. § 640d-5(d) (payment required after division of 1882

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5. Owelty is "a sum of money paid by one of two coparceners or co-tenants to the other, when a partition has been effected between them, but, the land not being susceptible of division into exactly equal shares, such payment is required to make the portions respectively assigned to them of equal value." *Black's Law Dictionary* (4th ed.)

Reservation to Tribe receiving land of lesser acreage and/or value).

2. *Legislative history*

The legislative history does not provide the Court guidance in determining Congress' intent regarding standards for partition of the 1934 Reservation. There is no discussion regarding the meaning of "fairness and equity".

3. *Law of the Case*

The Hopi Tribe argues that equal partition of the joint use area is required by precedent. In *Sekaquaptewa v. MacDonald,* 448 F.Supp. 1183, 1996 (D.Ariz.1978) (*Sekaquaptewa I*), the District Court (Judge Copple) held that the Hopis and Navajos each received an undivided one half interest in lands occupied by Hopis: "Inasmuch as the 1934 Act did not attempt to separate Hopi and Navajo property interests, the Hopi tribe and the Navajo tribe each received an undivided one half interest in these lands." The Ninth Circuit reversed only as to the conclusion that the Navajo Nation received a one half interest in lands which were occupied exclusively by Hopis. *Sekaquaptewa v. MacDonald,* 619 F.2d 801, 809-810 (9th Cir. 1980) (*Sekaquaptewa II*). The Hopis urge that the Ninth Circuit thus held that the Hopis should receive one half of the joint use acreage upon partition.

However, while it is clear that the Hopi Tribe has a one half interest in the joint use area, neither the District or Circuit Court specifically considered the appropriate standards for partition of that area. The June 2, 1978 Partial Judgment stated, "the Court reserves for future determination all questions relating to

partitioning of any such lands." Further, the Ninth Circuit did not direct the District Court on remand to partition joint use lands on an equal basis, requiring only that the District Court "declare title to be joint or undivided, subject to partition." *Sekaquaptewa II*, 619 F.2d at 809.

The law of the case therefore does not dictate that the Hopi Tribe receive one half of the acreage of the joint use area.

4. *The effect of Healing and the partition of the 1882 Reservation*

The Hopi Tribe argues that the Court should follow the standards employed in the division of the 1882 Reservation, set forth in 25 U.S.C. § 640d-5(a)-(f).[6] The preamble of section 640d-5 provided that the Court should be guided by the decision in *Healing v. Jones*, 210 F.Supp. 125, in which the District Court held that the Navajo and Hopi Tribes had an equal interest in land in the 1882 Reservation outside of an area held exclusively by the Hopi Tribe (District 6); section 640d(d) required that the partition be based on equal acreage and/or value of land insofar a practicable. The Hopis argue that this Court should apply the same standards in partitioning the joint use area in the 1934 Reservation.

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6. These factors provided that: (a) Hopi rights and interests in the exclusive Hopi area (District 6) were not to be reduced in any way; (b) partition lines should be drawn to avoid concentrations of population on the reservation of the other tribe to minimize and avoid undue social, economic and cultural disruption insofar as practicable: (c) reasonable provision should be made for access to religious shrines on the other tribes land; (d) partitioned land should be equal in acreage and quality insofar as practicable; (e) partitioned land should be contiguous to the reservation of that tribe where feasible and consistent with the provisions of that section; and (f) boundary lines should follow terrain which would facilitate fencing or avoid the need for fencing.

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While the *Healing* court held that Navajos had a one-half interest in land which they exclusively occupied (most of the land outside District 6), which holding was reflected in the provisions of the Settlement Act regarding partition of the JUA, the Settlement Act treated the 1934 Reservation dispute differently. Recognizing this, the Ninth Circuit in *Sekaquaptewa II* distinguished *Healing* and held that Hopis in the 1934 Reservation would have an *exclusive interest* in lands held *exclusively* by Hopis. In reversing Judge Copple's finding that the Hopi Tribe had a one half interest in lands on which Hopis were exclusively located (applying *Healing*), the Court stated, "The statute and order in *Healing* used different language in a different legislative setting than the 1934 Act." *Sekaquaptewa II*, 619 F.2d at 809.

As stated in this Court's April Findings, "[a]lthough the 1882 Reservation litigation is not relevant to the disposition of this lawsuit, the events of that dispute provide background understanding of the Navajo-Hopi land dispute, and may guide this Court in various ways in its decision." (4/27/92 Findings, p. 4). The standards utilized in the partition of the 1882 Reservation will be reviewed by the Court as they represent the factors Congress considered important in a very similar dispute. However, equality of acreage or value need not be the *primary* consideration; by failing to specify similar guidelines for the 1934 Reservation dispute, Congress provided discretion for this Court to arrive at appropriate standards to achieve a partition based on "fairness and equity". Thus equality of acreage and/or value will be only one factor that the Court considers in the partition.

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III. DELINEATION OF EXCLUSIVE USE AND JOINT USE BOUNDARIES

A. *Hopi Exclusive Use Area*

This Court's April 27, 1992 Conclusions of Law found that the following areas were exclusively used by Hopis in 1934: (1) the Village of Moenkopi, (2) Reservoir Canyon, (3) certain areas within Moenkopi Wash/Kerley Valley, and (4) part of the central/ southern Moenkopi Plateau. (4/27/92 Findings, pp. 77-78). These areas were explained in a more detailed fashion in the April 27, 1992 Findings of Fact, but need further definition. A map of the 1934 exclusive and joint use areas is attached at App. A to this opinion.

1. *The Village of Moenkopi*

The Court found that Hopis exclusively occupied the Village of Moenkopi in 1934, but did not delineate the boundaries of Moenkopi. (4127/92 Findings, p. 77). The Hopi Tribe argues that the current Moenkopi Administrative Unit, bounded on the north by the Highway 160, should be the boundary for Moenkopi.

However, the Moenkopi Administrative Unit boundary was created in 1972 to facilitate the administration of the Bennett Freeze, and its boundaries are not related to Hopi or Navajo use in 1934. Further, the 1980 codification of the Freeze, 25 U.S.C. § 640d-9(f), was intended to preserve the parties' rights subject to a final adjudication. Thus, this Court will not adopt the boundaries of the Moenkopi Administrative Unit as the Hopi exclusive use boundary.

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The Court will instead adopt a boundary for the Village of Moenkopi based on 1934 aerial photographs. (*See*, Exs. C and D to the Navajo brief on standards for partition and delineation of boundaries, based on Exs. 728 and 731). The photographs demonstrate that there were Hopi improvements north of the present Highway 264, including a water tank and stone quarry at Site 134. The exclusive use boundary will follow from Site 134 to the east along the 480-foot contour line to Reservoir Canyon. To the west, the exclusive use boundary will follow from Site 134 in a straight line to the northeastern corner of the Navajo allotments. The eastern boundary of the Village of Moenkopi is contiguous with that of Reservoir Canyon and need not be established; the southern boundary of the Village is contiguous with the Hopi allotments and Hopi fields in the Kerley Valley/ Moenkopi Wash area (which will be included in the Hopi exclusive use area) and also need not be established.

There is evidence that some area within the present-day Moenkopi Administrative Unit was jointly used by Navajos and Hopis in 1934, and the area within the Moenkopi Administrative Unit (outside of the Village of Moenkopi) outside the Hopi exclusive use will be treated as a joint use area.

2. *Reservoir Canyon*

The Court found that Reservoir Canyon, lying northeast of the Village of Moenkopi, was exclusively used by Hopis in 1934, but did not define the boundaries of the canyon. (4/27/92 Findings, pp. 24-25).

In the preceding section, the Court found that the boundary of Moenkopi Village followed from Site 134 along the 4800 foot contour to Reservoir Canyon. The western boundary for

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Reservoir Canyon will continue up the 4800 foot contour up to the present Highway 160, the northern boundary will be Highway 160, and the eastern boundary will travel south from Highway 160 along the 4800 foot contour on the other side of Reservoir Canyon until it connects with the northern boundary of the Hopi allotments.

3. *Moenkopi Wash/Kerley Valley*

The Court found that the Hopi exclusive area in the Moenkopi Wash/Kerley Valley area included areas upstream from the present Highway 264 bridge, downstream from the present Highway 264 bridge (except for Navajo patented allotments) and south of the Wash between Moenkopi and the "old Hopi bridge" at the western end of Kerley Valley. (4/27/92 Findings, pp. 16-21).

The northern border for the area east of the Highway 264 bridge (upstream) will be the center of Moenkopi Wash, extending to Adams Site 152 on the east. West of the Highway 264 bridge, the exclusive use boundary will travel with Highway 264 until the highway meets the Hopi allotments. This encompasses fields 11 and 12, east of the Hopi allotments, which the Court found were exclusive Hopi farming areas. The exclusive area will also include fields 12.11 and 12.8, immediately west of the Hopi allotments, southwest of the Village of Moenkopi. All Hopi allotments, including Tract 43 adjacent to the Navajo allotments, will be included in land partitioned to the Hopi Tribe. The exclusive area does not include the small area of land between the Navajo allotments and the "Government Farm" west of Moenkopi.

South of Moenkopi Wash and west of the Village, the Hopi

exclusive area in Kerley Valley will extend from the bluff west of the Navajo allotments (immediately west of present-day Site 45, belonging to the Goldtooth family) at field 3.1 to the western border of field 3.8. The northern boundary will be the center of the Wash, and the southern boundary will be the cliffs of the Moenkopi Plateau (the 4600-foot contour line). This excludes the site of the present-day Tuba City Sewage Lagoons, where the Court found that a Navajo camp had resided in 1934. (4/27/92 Findings, p. 49, n. 89).

4. *The Moenkopi Plateau*

The Court found that certain areas on the Moenkopi Plateau were within the Hopi exclusive area, including an area south and southeast of Moenkopi (south of the Wash) and the central/ southern Moenkopi Plateau to the southern border of the claimed Hopi exclusive use area, marked on Exhibit 703A [7]. (4/27/92 Findings, pp. 558, 63 64.)

The Court finds that the western boundary of the exclusive use area will descend from the southwestern corner of the Hopi allotments and follow the boundary proposed by the Navajo Nation. This boundary accurately reflects where Navajos lived and herded on the northwestern Plateau and along the western escarpment of the Moenkopi Plateau in 1934.

The eastern boundary of the Hopi exclusive area will begin at Adams Site 152, follow, the drainage of Ironwood Springs onto the Plateau, and proceed south to the Adams line, excluding the Bakalo (Hollow Place) and Little Bakalo (Little Hollow

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7. Exhibit 703A was prepared by Hopi expert Dr. Adams to portray his opinion of the Hopi exclusive use area.

Place). The areas for Hollow Place and Little Hollow Place shown on the Navajo Nation's map (Ex. A to its brief re: standards for partition and delineation of boundaries) will be adopted by the Court.

Conclusion

The total acreage of the Hopi exclusive area is approximately 22,675 acres.

B. *Hopi and Navajo Joint Use Area*

This Court found that a number of areas were jointly used by Hopis and Navajos in 1934: (1) Moenkopi Wash/Kerley Valley north of the Wash between the Government Farm on the east and the old Hopi bridge on the west, (2) Pasture Canyon, (3) north of the Moenkopi Wash and east of the Village of Moenkopi, (4) the western Moenkopi Plateau, (5) the northeastern Moenkopi Plateau, (6) Ward Terrace, (7) the Bakalo (Hollow Place), (8) Coal Mine Mesa, and (9) the southern Moenkopi Plateau. (4/27/92 Findings, p. 79). Each of these areas was more specifically delineated in the April, 1992 Findings of Fact, but need further definition.

1. *Moenkopi Wash/Kerley Valley north of the Wash between the Government Farm on the east and the old Hopi bridge on the west*

This Court found that the area north of the Moenkopi Wash between the Government Farm and the "old Hopi bridge" was jointly used by Navajos and Hopis in 1934. (4/27/92 Findings, p. 29-30). The joint use area excludes the Government Farm, in which the Court found the Hopi Tribe did not have an interest.

(Findings, pp. 29-30). Only the northern boundary requires elucidation.

The farming plots north of the old Tuba City- Cameron Road are below the ridge or bluff to the north at the 4600-foot contour line, and the northern boundary will be set at the 4600-foot contour, extending from Kerley's Trading Post to a north- south line immediately west of field 1.10.

The joint use area does not extend west of field 1-10 Only two farm plots were located west of field 1.10 (field 1.8 and 1.9), both of which the Court found were farmed by Navajos. Further, the joint use area will not extend north of the 4600- foot contour to pick up field 1.6e, which was farmed by Navajos in 1934.[8]

As discussed previously, the area within the Moenkopi Administrative Unit north of the Hopi exclusive use area and south of Highway 160 was also jointly used by Hopis and Navajos in 1934.

2. *Pasture Canyon*

The Court found that only Hopis farmed in Pasture Canyon in 1934, that two Hopi outfits grazed their livestock in Pasture

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8. The April, 1992 Findings classify *areas* as joint or exclusive use, rather than individual plots; otherwise, small islands of Hopi and Navajo exclusive interest would result, which under the statute would become a part of each respective reservation. However, some of these areas may have been overinclusive. In this circumstance since fields 1.8, 1.9, and 1.6e were found to be farmed by Navajos and are at the border of the joint use area, an island of Navajo use will not result, and these fields will be excluded from the joint use area.

Canyon, and that Navajos were grazing in and around Pasture Canyon. (4/27/92 Findings, pp. 25, 39-43).

The Hopi Tribe argues that the joint use area should include a "reasonable" area surrounding the canyon floor, and suggests a margin of one and one-half miles from the bottom of the drainage on all sides. However, the Court found no evidence that Hopis grazed outside of the Canyon in 1934. Further, the Hopi Tribe did not establish an interest in the "Government Pasture" in Pasture Canyon. Accordingly, the joint use area will be restricted to Pasture Canyon south of the Government Pasture.

3. *North of Moenkopi Wash and east of the Village of Moenkopi*

The April, 1992 Findings did not specify the eastern or northern boundaries for this joint use area. The Court found that east of Moenkopi, Hopis primarily grazed east and southeast of Moenkopi and Navajos primarily grazed east and northeast of Moenkopi; however, there was evidence of Hopi sites north of Moenkopi Wash (Adams Site 108 and 109). (Findings, p. 63-64).[9]

The western boundary of this joint use area is contiguous with the eastern boundary of the Hopi exclusive use area in the Village of Moenkopi/Reservoir Canyon areas, previously defined. The northern boundary will start from the point at which

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9. The Court also found that Hopis did not graze their livestock north of Moenkopi Wash to Red Lake, Middle Mesa, and Wildcat Peak, and stated, "Hopis did not graze their livestock north of Moenkopi Wash (except in Pasture Canyon, as previously discussed)." (Finding, p. 665). This latter finding was not meant to contradict the previous finding that Hopis grazed their livestock at Sites 108 and 109 north of the Wash.

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Highway 160 divides Reservoir and Pasture Canyons, and travel in a slightly northeasterly direction to pass directly north of Adams Site 108 and 109. The northern boundary will then curve in a southeast direction when it reaches a point north of Adams Site 152, until the boundary crosses the Moenkopi Wash at Adams Site 157, just west of "Standing Big Tree".

4. *Northeastern Moenkopi Plateau*

The Court found that the northeastern Moenkopi Plateau was jointly used by Navajos and Hopis in 1934. (4/27/92 Findings pp. 47-54). East of the Hopi exclusive use area, the joint use area boundary will follow the Moenkopi Wash to a point directly north of Rock Pile windmill. This represents a reasonable grazing area for the Hopis located at Adams Site 157, the easternmost Hopi site in 1934. There is no evidence of substantial Hopi use east of this area to support a further extension of the joint use area. The evidence cited by the Court at notes 85 and 115 places Hopis well within the boundary outlined above. The Hopis did not present any physical evidence of Hopi use east of Adams Site 157, and no government document mentioned Hopi grazing east of the boundary outlined.

5. *Western Moenkopi Plateau*

The Court found that the western Moenkopi Plateau was jointly used by Navajos and Hopis in 1934. (4/27/92 Findings pp. 47-54). The western boundary of the joint use area (except where it is extended by Ward Terrace) follows the western escarpment of the Moenkopi Plateau at the 4900-foot contour.

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6. *Ward Terrace*

The Court found that both Navajos and Hopis grazed their livestock on Ward Terrace in 1934. (4/27/92 Findings, pp. 43-47). In the Amended Findings, the Court clarified that this did not encompass the entire Ward Terrace geographic feature, but instead, that the southern boundary of the Ward Terrace joint use area was parallel with the southern boundary for Ward Terrace depicted on Ex. 703A (south of "Waawala" and "Spring on the Rocks"). The western boundary will travel southwest from the old Hopi bridge to the Five Mile Wash, and travel directly south to the southern boundary of the Ward Terrace use area.

7. *The Bakalo (Hollow Place)*

The Court found that both Navajos and Hopis used the Hollow Place in 1934. (4/27/92 Findings, p. 58). Because this area merges with the joint use area on Coal Mine Mesa and is bounded on the west by the Hopi exclusive use area, there is no need to discuss the boundaries for Hollow Place.

8. *Coal Mine Mesa*

The Court found that Navajos and Hopis jointly used portions of Coal Mine Mesa in 1934. (4/27/92 Findings, pp. 59-62). The western border of this joint use area is defined by the Hopi exclusive area (in the northern section) and by Appaloosa Ridge (travelling from the southeastern corner of the Hopi exclusive use area to the southern fence of the Buck Pasture).

The eastern boundary of the Coal Mine Mesa joint use area will begin at a point at Moenkopi Wash east of Adams Site 157 and directly north of Rock Pile windmill (as previously

discussed). The joint use boundary will then travel in a straight line southeast to "Tsorspatuyqa", follow the edge of Coal Mine Canyon until it reaches "Coal Mine", and then head directly south until the southern boundary at Hukvahklo (Windy Tank) is met. (This southern boundary will be established in the next section).

This excludes Coal Mine Canyon, for which there was little evidence of Hopi use. The area includes the points at which the SCS recorded Hopi grazing (see 4/27/92 Findings footnote 116), and includes Little Hollow Place. Although the Court initially found that Hopis did not use Little Hollow Place in 1934 (see 4/27/92 Findings, pp. 58-59), upon reexamination of the evidence it is clear that testimony referring to use on Coal Mine Mesa included Little Hollow Place. *See*, 4/27/92 Findings at note 116.

9. *Southern Moenkopi Plateau*

Finally, this Court concluded that the southern Moenkopi Plateau was a joint use area, south of the Hopi exclusive area border depicted on Ex. 703A, throughout Buck Pasture to Hukvahklo (Windy Tank). (4/27/92 Findings, pp. 55-58). Further, in Amended Findings issued on June 18, 1992, the Court clarified that the joint use area on the Moenkopi Plateau did not extend past Windy Tank. (Amended Findings, p. 5).

The joint use area is bounded on the north by the previously defined Hopi exclusive area; the southern, eastern and western boundaries must be defined. The escarpment of the Moenkopi Plateau forms the western border (except where it adjoins the joint use area on Ward Terrace). The eastern boundary follows straight south from the "Coal Mine" to Windy Tank, and does not meet the border of the 1882 Reservation (as previously discussed

in the Coal Mine Mesa section). The southern boundary extends from the western escarpment south of the southern Buck Pasture fence (at the Adeii Eechii Cliffs) to the eastern boundary.

Conclusion

The acreage of the joint use area is proximately 167,819 acres. The acreage of the "checkerboard lands" on the southern Moenkopi Plateau which this Court previously found were excluded from Hopi claims, must be subtracted from the acreage of the joint use area. The Court finds that Ex. 5571 best estimates the location of these checkerboard lands if they are eventually surveyed; the total acreage to be excluded is 14,976. Thus, the total acreage of the joint use area available for partition is 152,843 acres.

FINDINGS OF FACT

I. *Current Hopi Use*

A number of Hopis testified regarding their grazing and farming areas, including Jonathan Phillips,[10] Wilfred

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10. *Jonathan Phillips*, age 44, is presently a representative from Moenkopi to the Hopi Tribal Council. 1 TT 75. He testified that he has about 85 mature cattle and 15 horses. 1 TT 76, 78. He testified that his grazing permit authorizes 100 sheep units ("SUs"), plus 5 horses, 1 TT 77, and Phillips agreed on cross-examination that he has three times the amount of livestock authorized by his permit. 1 TT 117.

Phillips explained that Harry Goldtooth, the grazing committeeman, did not show up to count his stock. 1 TT 118. Further, Phillips contended that a previous grazing committeeman, Mark Begay, had told him that the BIA permit

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was invalid, and a permit issued by the Hopi Tribe allowed him 200 head of cattle. 1 TT 128. This was not confirmed, and he admitted on cross-examination that no other grazing committeeman had told him that the BIA grazing permits were invalid. 1 TT 125-126.

Phillips testified that he keeps most of his horses on the range with his cattle, although he keeps a couple of horses at a community corral, east of Moenkopi. 1 TT 78-79.

The central location for his cattle herd is in Little Hollow Place. Phillips has two corrals in Little Hollow Place (Site 2 on Ex. 4417); a large corral (east of the windmill) was built in 1955-1956 next to the stone house his grandfather Roger Honahni had built in the 1930's, 1 TT 81-83; a smaller corral is located next to a trailer he brought into the area in 1982. 1 TT 82-84. He goes out to Little Hollow Place four days a week to tend his herd, and stays in this trailer overnight when necessary. 1 TT 85. His family does not stay with him there. 1 TT 118-119. He rounds up the cattle about every two weeks. 1 TT 119.

Phillips testified that his stock mainly waters in Little Hollow Place at Windmill at 3A-27, referred to as the "Honahni Windmill". The Navajo Nation maintains the windmill, and he does minor repairs. 1 TT 79-80. The cattle graze in different areas, rotated on seasonal basis in spring, early fall, and winter to avoid overgrazing. 1 TT 995. Phillips outlined this grazing area on Ex. 4420. 1 TT 100. He testified that cattle can graze four to five miles from a corral in one day. 1 TT 131.

In the fall, Phillips testified that his cattle graze toward the northern Buck Pasture fence to the windmill at Goldtooth. They also graze up to the Lazy Ranch (Site 1, owned by William Numkena and his outfit) north of Buck Pasture, to the western escarpment of the Moenkopi Plateau, and north up the escarpment to the sand dunes southwest of Hollow Place. His cattle also graze east from the Goldtooth windmill to a ridge east of the Hollow Place, although he tries to keep the cattle out of this area. 1 TT 86-89.

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Phillips testified that in the winter, his cattle range from the Little Cowboy windmill at the northeast corner of Buck Pasture, around the Buck Pasture fence south of Buck Pasture to "Where the Hills End" windmill and the Salt Water windmill. He stated that at this time of year the cattle are centered around the Little Cowboy windmill, and graze north to Highway 264, east to the 1882 Reservation border, and west to the Hollow Place and to the sand dunes west of the Hollow Place. 1 TT 89-92.

In the spring, Phillips' cattle graze in the area around Little Hollow Place, north to the elbow of Highway 264 below Alvin Honyumptewa's corral (Site 5), east to the rodeo grounds on Coal Mine Mesa, south to the Goldtooth and Little Cowboy windmills, and west to the Lazy Ranch. 1 TT 92-94.

The Court finds that these grazing areas are overstated; although Phillips may find strays at the far reaches of this area (for instance, south of the Buck Pasture), his herd of 85 cattle could not have intensively used this entire area.

Phillips also testified that his cousin, Pierson Honahni, and Pierson's outfit use Phillips' corrals, and that they graze their herds together. 1 TT 885.

Phillips testified that Navajos also graze in this area. 1 TT 94-95. Haskey Littleman lives on the northern rim of Little Hollow Place (Site 58), and waters his stock at Little Hollow Place. 1 TT 122-23. Phillips testified that other Navajos haul water from Little Hollow Place, including Frank Whiterock (Site 56), Tony Billy (Site 75A), Gee Flatrock (Site 57), and Howard Begay (Site 79), but do not graze in the Little Hollow Place. 1 TT 127. Phillips also testified that Navajos water at the Little Cowboy windmill, including Kahn Yellowhair and Roger Begay, and at the "Where the Hills End" windmill and the "Salt Water" windmill, including the Nez boys and Railey Begay. 1 TT 124. Jonathan Phillips is also a farmer, and planted two fields this year. 1 TT 100. The first farm is in Kerley Valley, within the Moenkopi Administrative Area, and the second field is by the Moenkopi bridge, off Highway 264. 1 TT 100. The witness outlined these farming areas on Ex. 4421.

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Kaye,[11] William Numkena,[12] Leroy Hungeva,[13] Robert

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Phillips testified that a number of other Hopis farm in Kerley Valley in the immediate vicinity of his first field, including Conrad Tewa, Eugene Kaye, Loren and David Phillips, and Wayne Dallas, among others (fields #1-#4 on Ex. 4421). Phillips drew a line around the area farmed by Hopis in this area on Ex. 4421. 1 TT 106-108.

Phillips' second field is east of the Moenkopi Administrative Area (labelled #6 on Ex. 4421). A number of other Hopis farm in this area, as well: Russell Gaseoma, Martin and Catherine Gashiviseoma, Gerald Lomatewama, Allen Nuvayestewa, Franklin Howard, Van and Emerson Burton, Reggie Curry, John Sewiltima, Luther Honeyestewa, Willard Holmes, and Elliot Seletstewa (labelled #7-#15 on Ex. 4421). 1 TT 106-108. Phillips testified that no Navajos farm west of the Highway 264 bridge up to the Hopi allotments. 1 TT 113.

Jonathan Phillips also has a field in Hollow Place north of Highway 264, although it was planted by George Honahni this year. 1 TT 113-114. (This field is outlined in blue cross-hatch on Ex. 4417).

11. *Wilfred Kaye*, age 33, also testified regarding his ranching and farming activities. Although Kaye lives in Hotevilla on the Hopi Reservation with his family (and has active religious responsibilities as the kachina chief), Kaye has a ranch house in Hollow Place, at which he spends approximately 80% of his time when his sons attend school in Moenkopi. 1 TT 132-136.

Kaye began ranching in 1982 after he left the Navy; at that time, he was helping his father who lived at the ranch in Hollow Place. His father died in 1986, and had lived in Hollow Place for about twelve years. 1 TT 139-40.

Kaye's ranch house and corral are just north of the elbow of Highway 264 (Site 8). Kaye also testified that he also utilizes a second corral belonging to Elliot Seletstewa, located 4-5 miles east of Kaye's ranch house. 1 TT 144-45.

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Elliot Seletstewa's corral is actually north of Kaye's ranch, at Site 6. 2 TT 301-02 (Robert Charley). Kaye testified that he keeps about 25 cattle (including young) in the first corral, and 30-35 cattle (including young) in the second corral. In total, Kaye looks after 35 mature cattle and four horses; this includes his cattle, his brother Wilmer's cattle, and Wesley Honahni's cattle. Kaye's permit allows 132 SUs, including four horses. 1 TT 143.

Dr. Russell, the Navajos' expert witness, compiled a list of Hopi livestock holdings and permit allowances from the 1991 BIA grazing records. *See*, Ex. 5606 (Dr. Russell's summary of Hopi livestock holdings) (Wilfred Kaye permitted 132 SUs; in 1991, he had 32 cattle, and 2 horses, for a total of 138 SUs).

Kaye testified that in the summer, he hauls water every other day to the cattle in the first corral; these cattle also obtain water from Ironwood Springs and Moenkopi Wash (from the point at which the fields are fenced, east to the "Falls"). 1 TT 148-150.

The cattle around the second corral water along Moenkopi Wash from the "Falls" area up to the confluence of the Wash and Coal Mine Canyon (to the east of Moenkopi), at the windmill north of Moenkopi Wash (northeast of Lice Hill), and at the windmill below the bridge south of wash. The witness identified these water sources on Ex. 4417. 1 TT 153. He testified that the cattle do not graze around Ironwood Springs from the second corral. 1 TT 182

Kaye drew a red line around the area grazed by his cattle on Ex. 4422. 1 TT 154. On cross-examination, he testified that his cattle generally do not graze southeast of Coal Mine windmill, as Navajos drive them back, and that generally upon roundup, he usually only finds 5 of his cattle here. Further, he testified that he usually finds only 3-4 of his cattle by the windmill north of Lice Hill. 1 TT 180-81.

Kaye also testified that he has four horses, three of which graze on top of Coal Mine Mesa, north of Highway 264. Kaye drew a line around the area in

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which they graze, marked "H" on Ex. 4422. He keeps one horse with him for work purposes. 1 TT 166-67. His father had ten to twelve horses when he died; these horses grazed in the same area. Wilfred Kaye plans to buy two registered quarter horses for breeding, and testified that he will keep them in the same area. 1 TT 168.

Kaye testified that other Hopis graze in the same area. 1 TT 157-166, 183. Kaye herds with Bennie Tewa (his grandfather), who has about 50 cattle. *But see*, Ex 5606 (Dr. Russell's summary of Hopi livestock holdings) (Bennie Tewa permitted 65 SUs; in 1991 he had 17 cattle, for a total of 68 SUs). Kaye's and Tewa's cattle usually graze in same area Kaye drew a line around Tewa's grazing area on Ex. 4122 labelled "BT". 1 TT 155. Leroy Hungeva confirmed that Kaye and Bennie Tewa graze east and north of Highway 264. 2 TT 257-58. Further, Ralph Jackson has 2 cattle which graze with Kaye's cattle. *See*, Ex. 5606 (Dr. Russell summary of Hopi livestock holdings) (Ralph Jackson permitted 81 SUs; in 1991, had 8 cattle for a total of 12 SUs). Loren Phillips and another Hopi have about 45 mature cattle which graze together along the Wash, between Whitehorse windmill and Coal Mine windmill, into Hollow Place, and to Ironwood Springs. *See*, Ex. 5606 (Dr. Russell's summary of Hopi livestock holdings) (Lorenzo Phillips, Loren's father, permitted 165 SUs; in 1991, had 27 cattle, for a total of 108 SUs). Kaye also testified that Mark Taho has about 100 cattle, which graze north of the wash around Lice Hill, south of the Wash to Whitehorse windmill, and east into Coal Mine Canyon. *But see*, Ex. 5606 (Dr. Russell's summary of Hopi livestock holdings) (Mark Taho permitted only 15 SUs, and is not listed with any livestock in 1991). Later evidence revealed that Mark Taho's wife, Blanche Taho, a Navajo, owned all of the livestock. 8 TT 1241 44, 1285-86 (Faye Tso).

Kaye also testified that Navajos use some of these grazing areas: the Zahne family lives on the eastern edge of his grazing area, waters its sheep at Whitehorse windmill, and grazes its cattle in the area in which Kaye grazes his horses, south of the Coal Mine windmill. 1 TT 180-81, 1885. Further, the Begays graze their cattle around the Coal Mine windmill. 1 TT 182.

Finally, in connection with his religious responsibilities as kachina chief
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at Hotevilla Wilfred Kaye collects small amounts of different colored sand for sand painting, flowers, and duuma (clay) for the kachina dancers. He also collected a certain type of reed for his fiancee's bridal suitcase before his marriage (as do all Hopi men prior to getting married). The areas in which the witness collected these materials was marked on Ex. 4424. Kaye testified that there are no other areas in which these materials can be found, except that the required reeds can be gathered south of Table Top Mesa (not within the jointly used area). Kaye also testified that the Sparrow Clan obtained an eagle for an upcoming ceremony in the area marked "E", along Moenkopi Wash, that clan's regular eagle-gathering area. 1 TT 170-175, 187-88. Wilfred Kaye also carves kachina sculptures from cottonwood tree roots he collects along the Wash. 1 TT 176.

12. *William Numkena*, now 75 years old, testified that he is still active in farming and grazing livestock. (Numkena also testified in Phase I of this case; his previous testimony appears at 6 TT 928-991 of the first trial.) His livestock operations are centered at the "Lazy Ranch" on the Moenkopi Plateau (Site 1), a ranch built in 1938 by he, Raymond Nasetoynewa, James Humetewa, Bryan Gilbert, and Wilson Kaye. There is a corral, hay barn and house at the ranch, and the present members of the "outfit", including Raymond Nasetoynewa, Jr., Melvin Puyouma, and Jimmy Gail Honahni, graze their cattle together. 1 TT 193-96. The members stay overnight at the ranch in the summer once in awhile before roundup, and use the site for meals. 1 TT 196.

Numkena testified that he owns about 30 cattle, 20 of which are mature. He estimated that the outfit, as a whole, owns about 130 cattle. 1 TT 196. (This total amount conflicted with his estimation of cattle held individually by each outfit member; he estimated that Raymond Nasetoynewa, Jr. owned about 30 cattle, that Jimmy Gail Honahni owned about 15, and that Melvin Puyouma owned about 8 cattle. 2 TT 221-22.) Numkena's grazing permit allows 64 sheep units. 2 TT 220-21. *See*, Ex. 5606 (Dr. Russell's summary of Hopi livestock holdings) (William Numkena permitted 64 SUs, and in 1991, he had 33 cattle, for a total of 132 SUs; Ray Nasetoynewa permitted 53 SUs, and in 1991, had 22 cattle, for a total of 88 SUs; Melvin Puyouma permitted 35 SUs, and in 1991 had 14 cattle, for a total of 56 SUs; no information given regarding Jimmy Gail Honahni).

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The outfit rounds up their cattle once a month, sometimes twice a month, and checks on cattle between round-ups about 3 times per week in the winter. 1 TT 197-98, 223. He checks up on his cattle less in the summer when he is busy with his fields. 2 TT 223. Numkena testified that the outfit's cattle water at the windmill by his corral, the windmill in Little Hollow Place, at a catch basin in Big Hollow after rain, by Alvin Honyumptewa's corral (Site 5), south to Goldtooth windmill, at the four springs on the western escarpment of the Moenkopi Plateau. 1 TT 198-99. The cattle grazed between these water sources. 1 TT 199. Numkena outlined this area on Ex. 4423. 2 TT 206. His cattle do not go inside the Buck Pasture. 2 TT 206.

Numkena testified that other Hopis, including the Honahni brothers and Jonathan Phillips use the same range, and that Alvin Honyumptewa sometimes uses the northern part of the grazing area. 2 TT 207, 225-26.

Further, Numkena testified that Navajos use this area: Jim Lefthand's daughters, Irene Manygoats and Arlene Begay (who live at Sites 54 and 53, respectively), use the Goldtooth windmill, the windmill at the Lazy Ranch, and the springs on the west rim of the Moenkopi Plateau; he did not see them north of Spring on the Rocks. 2 TT 207-08, 227-30, 240. Henry Billy, who lives at Site 83, grazes his cattle southwest of the Little Cowboy windmill and around the Goldtooth windmill, but not at the Lazy Ranch windmill or the west rim of the Moenkopi Plateau. 2 TT 207-08, 232-33. He testified that no one lives at the Goldtooth ranch now, and that the Goldtooths grazed north of Buck Pasture only once when windmill was broken about three years ago. 2 TT 208-09. He testified that these Navajos have not interfered with the use of his grazing areas. 2 TT 233.

William Numkena farms, as well. One field is in Kerley Valley, as represented on Ex. 4424. He first started working this field when he was a young boy, and his nephews now help farm the field. This year, he planted corn, beans, melon (typical crops for dry fields); he also has apricot and peach trees. Kerley Valley is irrigated (though not frequently) by an irrigation ditch traveling down the length of Kerley Valley from Moenkopi Wash. 2 TT 210-213. Numkena

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goes to his fields every day during the growing season to pull weeds and check on plants. He stores his crops for his own consumption. 2 TT 213.

Numkena has another field in Pasture Canyon, above the Pasture Canyon Reservoir and below the area that used to be the "Government Pasture"; he marked the location of this field on Ex. 4425. 2 TT 214-215. He testified that some of the land in this area is too wet to be farmed, but that all of the remaining land is farmed. 2 TT 216. During the growing season he visits the field every day; this year he planted sweet corn, chilies, tomatoes, and string beans (crops possible only with irrigation). 2 TT 217. His son helps him with this field. 2 TT 218.

Numkena further testified that Navajos farm above the Hopi farms, in the "Government Pasture". 2 TT 214-215. The Government Pasture fence is still present, which forms a boundary between the Navajo and Hopi farms. 2 TT 233. Water for the Hopi fields first comes through the Navajo farming area in an irrigation ditch; Numkena testified that this ditch has been there since he was young and has been maintained by Hopis every year. When he was young, the ditch was maintained as a community effort in early spring; now, every farmer must maintain his portion of the ditch. 2 TT 217-219. He testified that Navajos have not interfered with the water in Pasture Canyon. 2 TT 234.

13. *Leroy Hungeva*, age 39, testified that he has been a full-time farmer and rancher since 1985. 2 TT 247. He presently has 13 breeding cows, 5 yearlings, 2 bulls, and one horse for which his sister Lucille Walker cares for in Peach Springs. The cattle belong to him, his sister, and his brother. He testified that his grazing permit allows 103 sheep units, plus 4 horses. 2 TT 247-249. *See*, Ex. 5606 (Dr. Russell's summary of Hopi livestock holdings) (Ethel Hungeva (Leroy's mother), permitted 123 SUs: in 1991, he had 22 cattle, for a total of 88 SUs).

Hungeva has a corral, a cinder block house, a small trailer and a water tank at a site in the Hollow Place, north of Highway 264. (Site 7). He sleeps at the trailer (brought to this site in the early 1980's) when branding or if some of his
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cows are in trouble, and occasionally cooks meals there. The cinder block house, built in 1983, is unused because the walls are cracking. 2 TT 250-252.

Hungeva hauls water for his cattle every day in summer and every three days in winter. The cattle graze around the corral, and occasionally graze to Coal Mine Mesa windmill for water if he doesn't haul water to them. Hungeva marked this grazing area on Ex. 4426, and a larger grazing area to the north used by his father in the 1960's. 2 TT 253-255.

He testified on cross that he tries to keep his cattle in Hollow Place. 2 TT 269-70.

Hungeva also testified that Dennis Tewa grazes his cattle just north of Hungeva, and marked his grazing area on Ex. 4426. Hungeva testified that Tewa has about 50 mature cattle (though has never counted), and that he sees Tewa's cattle when taking water to his own. 2 TT 259-60, 271-72. *But see*, Ex. 5606 (Dr. Russell's summary of Hopi livestock holdings) (Dennis Tewa permitted 35 SUS, and in 1991, had 10 cattle for a total of 40 SUs). He also testified that Loren Phillips has about 30 cattle. 2 TT 273. *See*, Ex. 5606 (Dr. Russell's summary of Hopi livestock holdings) (Lorenzo Phillips permitted 165 SUs in 1991, Phillips had 27 cattle, for a total of 108 SUs). Further, Hungeva testified that Mark Taho grazes his cattle east and north of Highway 264, and marked the location of Taho's corral north of Moenkopi Wash on Ex. 4426. 2 TT 261-62.

Hungeva testified on cross that he sees Navajo cattle on the fringes of Hollow Place, and that the strays water at his trough. Although he doesn't know the names of the Navajos who own these cattle, he knows Karen Dallas, a Navajo who lives part-time on the east side of Hollow Place. 2 TT 274-75.

Hungeva's family has four fields: one is below lower Moenkopi Village in the Hopi allotment area, two are in Pasture Canyon, and one is in Hollow Place. The field in Hollow Place is about 100 yards south of his corral: the last time it was planted was in the mid-1970's, although the field is still fenced and is used

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Charley,[14] Gilbert Naseyowma,[15] Pierson Honahni,[16] Alton

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for pasturing horses and injured cows. 2 TT 263-64. The fields in Pasture Canyon are planted every year. He marked the location of these fields on Ex. 4427. 2 TT 265-66. As the allotted lands are outside the scope of this litigation, no evidence was presented about the field in the allotment area.

14. *Robert Charley*, age 38, grew up in Moenkopi and returned in 1978 after time in the service and college at Northern Arizona University: 2 TT 282. He cares for his mother's 18 cattle, the grazing permit allows 25 cattle. *See*, Ex 5606 (Dr. Russell's summary of Hopi livestock holdings) (no listing for Robert or Phyllis Charley). He checks the cattle every week, and rounds up the cattle about four times per year during calving and branding. 2 TT 282-86, 308, 311.

Charley's corral is west of windmill 3K-325 (Site #4). This corral was built in the late 1980's: he has had a corral in about five other places in the past. 2 TT 311-12. His cattle water at windmill 3K-325, at springs near Tonali, Toh Nee Di Kishi, Spring on the Rock, at the Lazy Ranch windmill, at the Little Hollow Place windmill, and in Hollow Place after a rain. At times, Charley has also found some of his cattle near the Goldtooth windmill, and the Little Cowboy windmill (though these appear to be strays). 2 TT 286-92, 296-97. 315-16. Charley marked the area in which his cattle graze on Ex 4428 though he tries to keep them in the northern half of this area. 2 TT 294-96. The Court finds that this grazing area is larger than 18 cattle could regularly graze. He tries to keep them away from Moenkopi Wash and often finds them in Hollow Place. 2 TT 314.

Alvin Honyumptewa also grazes his livestock in the northern part of the area Honyumptewa who Charley testified owns about 65 cattle (including calves), keeps them at a corral at Site 5 *See*, Ex. 5606 (Dr. Russell's summary of Hopi livestock holdings) (Alvin Honyumptewa permitted 65 SUs in 1991, he had 22 cattle and 1 horse, for a total of 93 SUs).

Honyumptewa and Charley's father were once partners, and Charley and Honyumptewa have worked together on range improvements, such as

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maintenance and improvement of the springs on the western edge of Moenkopi escarpment. 2 TT 298-300, 309-10.

Charley also testified that Elliot Seletstewa has a corral just southeast of the Village of Moenkopi (Site 6). Although he doesn't know how many livestock Seletstewa has, he testified that Seletstewa's cattle graze around the corral and in the same area as Charley's cattle. 2 TT 301-02. *See*, Ex. 5606 (Dr. Russell's summary of Hopi livestock holdings) ("Eli Seletstewa" permitted 37 SUs; in 1991, he had 33 cattle for a total of 132 SUs).

Charley also testified that Navajos use the area, as well, watering their livestock at the Lazy Ranch, Little Cowboy, and Goldtooth windmills. 2 TT 316-17.

Charley's family has three fields: one in Pasture Canyon, another in Kerley Valley (north of the diversion dam), and the last on the south side of the Wash in Kerley Valley.

In Pasture Canyon, the field is located in the Hopi field area between the reservoir and old Government Pasture. Charley marked the Kerley Valley fields on Ex. 4429; the field south of the Wash belonged to his grandfather, Talawepi, and has not been planted since his death in the early 1970's. The field north of the diversion dam belongs to his brother Lester, and is still planted. 2 TT 302-04.

15. *Gilbert Naseyowma*, 58 years old, also testified regarding his grazing and farming areas. Gilbert Naseyowma began raising cattle in 1955-57, working with Elliot Seletstewa's father, Robert Charley's father, Alvin Honyumptewa, Bennie Tewa, and Logan Luma. Although he lived in other areas during the 1960's and 1970's, he returned to Moenkopi full time about six years ago and began acquiring cattle about 2 years ago. He now works with Elliot Seletstewa and Willard Holmes. 2 TT 321-26.

He testified that he has 8 cows and 2 horses, Elliot Seletstewa has about 25-
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30 cattle and one horse, and Willard Holmes has about 18 cows, and no horses. 2 TT 327. His grazing permit allows 163 sheep units, plus 5 horses; both Elliot Seletstewa and Willard Holmes have grazing permits, though he does not know how many sheep units they are permitted. 2 TT 341-42. *See*, Ex. 5606 (Dr. Russell's summary of Hopi livestock holdings) (does not list holdings of Gilbert Naseyowma; "Eli Seletstewa" is permitted 37 SUs, and in 1991 had 33 cattle for a total of 132 SUs; Willard Holmes is permitted 15 SUs, and in 1991 had 10 cattle, for a total of 40 SUs).

Naseyowma is a long-distance runner and checks on his cattle on the weekends by running to their grazing areas; the outfit rounds up the cattle weekly to keep the cattle away from the fields in Moenkopi Wash. 2 TT 328. The livestock graze from the corral at on the Moenkopi Plateau on the west side of Highway 264 (Site 6). 2 TT 321-23. The outfit hauls water to the corral during the summer; the cattle also water at three springs just south of Moenkopi Wash, at a spring just north of the corral, and at the Wash when it is running. The cattle also graze to the springs at Tuutsiva (Toh Nee Di Kishi) and Tsinngava (Tonali) on the escarpment, and the windmill by Sites 4 and 5. 2 TT 329-331, 343-45. Naseyowma marked his grazing area on Ex. 4431. 2 TT 332-34.

Naseyowma testified that other Hopis use this grazing area, as well, including Robert Charley and Alvin Honyumptewa. 2 TT 335. Further, he has seen Navajo livestock grazing on the northwestern rim of Moenkopi Plateau. 2 TT 325.

Gilbert Naseyowma has 5 fields. One field is to the east of Moenkopi, 1/2 mile above Ironwood Springs, which was not planted this year due to rain damage. The other fields are in Kerley Valley, and were outlined on Ex. 4431. The most western field, south of the Wash (labelled #1 on Ex. 4431) is presently planted and is irrigated from the Wash; during planting, Naseyowma goes to the field every other day, but now goes only on weekends. Field #2 and #3 are irrigated from the Hopi Reservoir and are presently planted. Field #4 has been plowed, but not planted this year, since Naseyowma is building a house there. 2 TT 335-39.

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16. *Pierson Honahni* testified that his family owns 30-35 adult cattle and 2 horses, he personally owns 8 of the cattle. He admitted that the family's permit allows only 41 sheep units. 2 TT 351-53, 365. See, Ex. 5606 (Dr. Russell's summary of Hopi livestock holdings) (Stanley Honahni (Pierson's father) permitted 41 SUs; livestock not counted in 1991). Although he is presently employed by the BIA as a heavy equipment operator, Pierson Honahni and his sister Alice usually care for the cattle. 2 TT 351-53. Their corral is in Little Hollow Place (Site 3), located by a now-unused rock house built 40 years ago by his grandfather Roger Honahni, father Stanley Honahni, and others of the "Lazy Ranch" outfit. Honahni brought a trailer onto the site about 10-15 years ago. Others use the corral, including Jonathan Phillips and the Lazy Ranch outfit. 2 TT 354-56, 365-66.

Honahni checks on the cattle twice a month, and conducts a complete roundup 4-5 times per year. 2 TT 355. His cattle most frequently water at the windmill in Little Hollow (next to his corral), the Lazy Ranch windmill (Site 1) and Goldtooth windmill, although they also occasionally use Little Cowboy windmill and Spring on the Rock. Further, when it rains, water gathers south of Highway 264 in Hollow Place. 2 TT 357-58. Honahni marked his grazing area on Ex. 4433. Jonathan Phillips, and the Lazy Ranch outfit also use this area. 2 TT 360-61, 365-67.

Honahni also testified that Navajos use this area: Haskey Littleman lives between Hollow Place and Little Hollow Place and waters his livestock at Little Hollow Place and at Little Cowboy windmill. Tony Billy and Henry Billy water their cattle at Little Hollow, and Helen George waters her livestock at Little Cowboy. Further, two Navajo families live south of the Lazy Ranch (Manygoats and Begay), and water their livestock at Goldtooth windmill. 2 TT 367-70.

Honahni testified that he has two fields: one in Hollow Place north of Highway 264 (a dry farm which has been planted every year), and a second in Kerley Valley (which is planted every year). Honahni marked the Kerley Valley field on Ex. 4434. 2 TT 361-63. Honahni testified that he has problems with Navajo cattle in his field in Hollow Place every year. 2 TT 371.

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Honahni, Sr.,[17] Clayton Honyumptewa,[18] and Eugene Kaye.[19]

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17. *Alton Honahni, Sr.*, age 66 (who also testified in the first trial) is presently governor of Moenkopi; this is the third time he has been elected governor, and has served in a variety of other capacities for the Hopi Tribe. 2 TT 375-77.

Honahni has 35-40 mature cattle and 6 horses. He has grazed his cattle and horses on the Hopi Partitioned Lands since 1986; before 1986 he grazed in Little Hollow Place with Roger and Stanley Honahni and Jonathan Phillips, and by the confluence of Moenkopi Wash and Coal Mine Canyon for a short while. 2 TT 387-90.

Honahni has three fields: one field is used by his nephew George Honahni at Hollow Place, another is west of Moenkopi, and the third field is east of Moenkopi by Moenkopi Spring. Honahni marked the location of these last two fields on Ex. 4436. All three of these fields have been farmed for the past 35 years. 2 TT 391.

18. *Clayton Honyumptewa*, age 36, testified that his family farms east of the Village below Highway 264, and by the Moenkopi Administrative Unit. The family also has a dry farm in Hollow Place although it has not been planted since his father died 1 and 1/2 years ago. 2 TT 406-08.

19. *Eugene Kaye*, age 60, returned to Moenkopi in 1982 when he retired from a career with the Indian Health Service and is now a councilman from Upper Moenkopi to the Hopi Tribal Council. 3 TT 441-42, 454. He farms four fields in Kerley Valley and Pasture Canyon. The first field is located towards the "old bridge" in Kerley Valley north of the Wash the second is southwest from the village within the Moenkopi Administrative Unit, the third is east of the Village in the Moenkopi Spring area, and the fourth is in Pasture Canyon. He confirmed that his farms in Kerley Valley were accurately represented on Ex. 4437, and his Pasture Canyon field on Ex. 4438. 3 TT 442-43.

He has been farming the field in western Kerley Valley for about four years; prior to this time it was farmed by Elliot Seletstewa. 3 TT 459-60. Kaye

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Many of these people testified about the grazing and farming practices of other Hopis, as well.

Most of the Hopis living in the 1934 Reservation live in the Village of Moenkopi or within the Moenkopi Administrative Unit. Some of the Hopis have dwellings east of Moenkopi adjacent to farming areas,[20] and some ranchers have "ranch houses" in which they stay briefly when caring for their livestock. These ranching sites are depicted on Ex. 4417.

The Hopi grazing area is centered on the central Moenkopi Plateau, around Little Hollow Place, Hollow Place, and along the western escarpment of the Plateau. Less intensive Hopi grazing occurs on the northwestern section of the Moenkopi Plateau, on

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testified that Steven Albert also farms in the area north of the Wash although he did not know whether Albert planted this year. 3 TT 444-45, 461. The area between he and Steven Albert is farmed by a Navajo. 3 TT 459-60. Kaye has received little production from this dry farm.

He has personally farmed the field in Pasture Canyon since 1982, though his family worked the field before this date. He showed the approximate location of the southern fence of the old Government Pasture where the Navajo fields begin, north of the Hopi field area. 3 TT 446-48. He testified that he and Allen Nuvayestewa farm the most northern Hopi farms in Pasture Canyon; the Government Pasture runs along the north side of the field.

20. Willard Holmes, Elliot Seletstewa, Charlene Holmes, Lenora Cordero's son, Franklin Howard and his daughters, Joseph and Edna Tallas, and Howard Lomatawayma have homesites east of Moenkopi. Willard Holmes Franklin Howard. Joseph and Edna Tallas, and Howard Lomatawayma also have homes in Moenkopi. 3 TT 431-36, 439 (Honyumptewa).

southern Coal Mine Mesa, and on the northeastern section of the Moenkopi Plateau. Outside of occasional strays, no Hopi grazing occurs south of the Buck Pasture, in Coal Mine Canyon, or north of Moenkopi Wash. No Hopis graze inside the Buck Pasture or on Ward Terrace. Most of the area intensively grazed by Hopi livestock will be partitioned to the Hopi Tribe.

The water sources most intensively used by Hopis for grazing include the "Left- hand" (or "Lazy Ranch") windmill, Goldtooth windmill, Little Hollow Place windmill, the springs on the western escarpment of the Moenkopi Plateau (including Spring on the Rocks, View Point Well, Seller Springs, Tonali and Toh Nee Di Kishi), the Owl Head windmill and Ironwood Springs. Fewer Hopi livestock use the Little Cowboy windmill, Coal Mine windmill, Rock Pile windmill, Whitehorse windmill, and the Moenkopi Wash.[21] Only strays use the water sources south of the Buck Pasture, including "where the Hills End" windmill and Salt Water windmill, neither of which are within the 1934 joint use area, in any event. Most of the water sources intensively used by Hopi livestock will be partitioned to the Hopi Tribe.

Hopis primarily farm in Pasture Canyon (south of the old "Government Pasture"), and in the Moenkopi Wash/Kerley Valley area south of Moenkopi Wash. There are Hopi farms north of the wash in the vicinity of the Village of Moenkopi within the Hopi exclusive use area, and a few Hopi farms north of the Wash in western Kerley Valley. Also, there are a few Hopi farms in Hollow Place. Clayton Honyumptewa, Director for the Office of Hopi Lands of the Hopi Tribe, created two maps showing all

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21. The Little Cowboy and Whitehorse windmills are outside of the 1935 joint use area and not subject to partition to the Hopis.

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Hopis farming in Kerley Valley and Pasture Canyon. *See,* Ex. 4437 (Kerley Valley); Ex. 4438 (Pasture Canyon). He prepared these maps from records kept by his office in the last three years for purposes of this litigation, and by interviewing Hopis in these areas over the last 2 months. 2 TT 400-01, 4012 (Honyumptewa).

II. *Current Navajo Use*

Navajos also testified about their residence, farming and grazing in the 1934 joint use area, including Ale Manygoats,[22]

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22. *Ale Manygoats*, 67 years old, has lived on the Moenkopi Plateau at Sites 53 and 54 for 42 years. He first lived at Site 53, when he married Arlene Lefthand (now Arlene Begay). After they divorced around 1956, Ale married Arlene's sister Irene, and they have since resided at Site 54. Arlene remarried, and still lives at Site 53 full-time with her husband Arthur Begay. 6 TT 910-14.

Arlene and Irene's mother, Alice Lefthand, now about 96 years old, lives in Tuba City, and Irene goes to Tuba to care for her and occasionally stays overnight. Ale also stays overnight in Tuba City sometimes, but returns home every day to care for his sheep and cattle. Manygoats testified that his son, Amos Manygoats, and Amos' family also live at Site 54, although when he is working, he sometimes stays at a job site. 6 TT 916-18.

Dr. Scott Russell, the Navajos' expert anthropologist, confirmed that Ale and Irene Manygoats live at Site 54, that Arlene and Arthur Begay live at Site 53. Dr. Russell testified that the Lefthands moved into the area in 1936-37 because they are listed in the 1940 grazing records. 4 TT 584-88. *But see*, Ex. 5565A (Dr. Russell's resident and principal user list) (does not list Amos Manygoats as a resident or principal user of Site 54).

Manygoats testified that he has 6 horses, about 5 mature cattle, 10 sheep and 6 goats, which are cared for by he and his son. Dr. Russell testified that Irene Manygoats is permitted 63 SUs, and in 1991, had 15 sheep and goats, 7 cattle, and 3 horses, for a total of 58 SUs. 4 TT 584-88.

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Edward Begay,[23] Julia Hadley,[24] Alice Edison,[25] Helen

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Dr. Russell compiled a list of Navajo livestock from BIA grazing records in 1991, 1990, 1989, and 1968. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (same).

Manygoats testified that his cattle graze in a 3 mile radius from his home, to the "Lefthand" (or Lazy Ranch) windmill, to the springs on the western escarpment of the Moenkopi Plateau (including Seller Spring), to Wolf Point and to the Goldtooth Ranch. 6 TT 918-21. However, at deposition he testified that his cattle don't often graze north of his homesite (including to Lefthand windmill and Wolf Point), due to Hopi cattle to the north. 6 TT 925-26. The sheep mainly graze to the western escarpment of the Plateau, as far as Seller Springs. 6 TT 921-22.

Manygoats also testified that Arlene and Arthur Begay have 8-9 cattle, which graze in the same area and use the same water sources as his cattle. 6 TT 922-23. Dr. Russell testified that Arlene Begay was permitted 69 SUs, and in 1991 had 4 sheep and goats, 4 cattle and 2 horses, for a total of 30 SUs. 4 TT 584-88. *See also*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (same).

Finally, Manygoats testified that he has fields at his homesite, and that Arlene and Arthur also have fields at their site. These fields are planted every year. 6 TT 923.

23. *Edward Begay*, 57 years old, lives in Tuba City with his wife Roberta. 6 TT 930. He retired after 36 years as a Home Living Assistant with the BIA boarding schools. 6 TT 947, 949-50.

Begay testified he owns about 14-16 adult cattle and 5 horses, and has a grazing permit which allows 75 sheep units. His daughter Judy Secody owns 6 adult cattle, and has a grazing permit which allows 40 sheep units. They herd with Edward's sister Gloria Hadley, Ramona Kaye Jim, and Don Davis. Begay

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testified that Ramona Jim has 20 adult cattle and 5-6 horses, though did not know how many sheep units are authorized on her grazing permit. Don Davis cares for 5 cattle belonging to his wife, Eula Davis (Gloria Hadley's daughter); Gloria Hadley's grazing permit allows 24-25 cattle. 6 TT 931-34, 947. See Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (Edward Begay and his daughter permitted 120 SUs, and in 1991 had 14 cattle and 3 horses, for a total of 71 SUs; Ramona Jim is permitted 70 SUs, and in 1991 had 23 cattle and 5 horses, for a total of 117 SUs; Gloria Hadley permitted 219 SUs, and in 1991 had 7 cattle, for a total of 28 SUs). *See also*, 4 TT 537-42, 550-51 (Dr. Russell) (same).

Begay testified that he has two corrals; one just north of Coal Mine windmill (Site 59), and the other close to Rock Pile windmill (Site 62B). At Site 62B, he has a small house with a shade, in which he stays overnight every week, sometimes for two weeks at a time. Ceremonials are sometimes held here. 6 TT 934-37. Begay testified that the corral at Site 59 was built around 1948, and is still used. There are three houses at this site, none of which are currently occupied. 5 TT 937-41. Dr. Russell confirmed the use of the corrals at Sites 59 and 62B. 4 TT 537-42, 550-5 1 .

Begay checks his cattle every day, and in the summer turns the water on every day at the Coal Mine Mesa windmill. His cattle graze between the Coal Mine Mesa windmill and the Rock Pile windmill, one mile southwest of Rock Pile to where Gee Flatrock lives (Site 57), and north of Rock Pile windmill along the Coal Mine Canyon above Site 64B. 6 TT 941 43. He also testified that Ramona Jim's horses graze in the same area, and also to White Horse windmill. 6 TT 945. Julia Hadley testified that Edward Begay's grazing area often overlaps hers, in the same area. 6 TT 980.

Begay also testified that he has a 4-5 acre dry farm west of Coal Mine windmill at Site 62A. He has planted this field for about 10 years, and plants it every year. 6 TT 945 46.

24. *Julia Hadley,* 43 years old, has lived on Coal Mine Mesa at Site 61
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since 1953. Her husband Dan Hadley, Jr. is a painter for the Tuba City School District; she is not presently employed. They and their six children live part-time in a trailer at Site 61, behind the rock house belonging to her late father, Herbert Zahne. Her husband also has a house in Tuba City, and she and the children live at both places, spending the majority of weekends and summers at Coal Mine.

Growing up, she lived near Site 61 in a hogan about 1 and 1/2 miles away, until the rock house was built at Site 61 in 1953-54. Her three brothers, Harrison, Norman, and Herbert, Jr., now live in the rock house. Harrison and Herbert, Jr. live at Site 61 full-time, and Norman stays with his stepchildren in Tuba City when he goes to the hospital. 6 TT 954-63. Dr. Russell confirmed that Julia Hadley and Norman Zahne live at Site 61. 4 TT 547-50.

Hadley's sister Sadie has a house at Site 64. Although she also has a house in Tuba City, Julia Hadley testified that Sadie spends 1-2 nights a week at Site 64, and comes out every day to tend the cattle. 6 TT 977-79. Dr. Russell testified that Site 64 is unoccupied. 4 TT 554-55.

Hadley also testified that Sadie's son, Glenmore Begay, lives at Site 60. Her father Herbert Zahne used a hogan at this site until his death seven years ago; the Hopi Tribe mistakenly tore down the hogan after his death, and later gave permission for Glenmore Begay to rebuild at that site.

He built a new hogan during the past two years. 6 TT 971-74. Glenmore's wife is a high school history teacher in Pinon, and lives at the school during the school year, coming back to Coal Mine on the weekends and summers. Glenmore has also been a substitute teacher occasionally. Glenmore spends about 3 days a week at the site. 6 TT 974-77, 988-90. Dr. Russell confirmed that Glenmore Begay and his family live at Site 60. 4 TT 543-47.

Julia Hadley testified that she grazes her livestock along with her sister Sadie, Glenmore Begay, Joe Bedonie (her brother-in-law), Joann Old Crow (Joe's daughter), and her brothers Norman and Herbert, Jr. Hadley testified that
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she has 12 cows and that the total herd is about 30 mature cattle. She also has 3 horses, Norman has 5-6 horses, Joe has 2 horses, Joann has 1 horse; 10 of these graze on the open range with the cattle. 6 TT 964-66. Glenmore Begay sells and buys horses for a business, and has between 9 and 22 horses at any one time. 6 TT 971-74. She, Sadie, Joann, Joe, and Glenmore have grazing permits. 6 TT 979. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (Julia Hadley permitted 100 SUs, and in 1991 had 21 cows and 3 horses for a total of 99 SUs; Sadie Zahne Yazzie is permitted 40 SUs, and is listed as having 22 cows and 2 horses, for a total of 98 SUs; Joe Bedonie is permitted 47 SUs, and in 1991 had 8 cows and 3 horses for a total of 47 SUs; Glenmore Begay is permitted 25 SUs, and in 1991 had 10 cattle and 13 horses, for a total of 105 SUs). The group thus appears to have less livestock in 1992 than it did in 1992. *See also*, 4 TT 543 47, 547-50, 554-55 (Dr. Russell) (same).

Hadley testified that the outfit has a number of corrals: the cattle corral at Site 61B was built in the early 1960's (though another was in same vicinity before it was built), there is a sheep and horse corral next to the house at Site 61, and Glenmore has a corral in Coal Mine Canyon. 6 TT 966-67. She testified that the livestock graze past the Rock Pile windmill, past Site 64B (her sister Sadie's cornfield) and Site 64 (Sadie's house), and along the north side of Highway 264, and occasionally to Coal Mine windmill. 6 TT 968-70, 980. Glenmore grazes his horses against the canyon between the rodeo ground and the 1882 fence, north of Highway 264. 6 TT 977.

The family has one farm field near their house. Although they had two fields in Coal Mine Canyon, the road caved in 2-3 years ago and the fields are thus inaccessible. None of the fields have been farmed recently since her brother Norman became sick. 6 TT 970-71.

25. *Alice Edison*, age 48, was born on Coal Mine Mesa to Henry and Yazzie Billy. She, her husband, and children have a house at Site 63, although she sometimes stays in Tuba City at her sister-in-laws house with her children during the school year. Her mother is in a nursing home in Flagstaff, and her father lives on Coal Mine Mesa until it gets cold, at which point he moves to
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George.[26] Evelyn Flatrock,[27] Edith Billy,[28] Sally Yazzie,[29] Alfred

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Tuba City to live with his daughter. 6 TT 992-97. Dr. Russell testified that Yazzie Billy was in a rest home, that Henry Billy travelled back and forth to Tuba City, and was not sure how much time Alice Edison spent at Site 63. 4 TT 551-54.

Edison testified that she has 10 sheep, 15 goats, 2 horses, and 4 cattle. Dr. Russell testified that in 1991, she had only 2 sheep and 4 goats. 6 TT 999-1002. *See also*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (Alice Edison permitted 100 SUs in 1991). She explained that they had to sell much of their livestock three years ago to help with her mother and father's health problems, and that although they were counted as only having 6 sheep and goats in 1991, they have acquired more animals since then. 6 TT 999-1002.

Edison's husband cares for the sheep every day; she helps care for them when she is at the site. Their sheep and cattle water at Little Cowboy, Little Hoilow Place, and Goldtooth windmills. The cattle graze north of the site about 3 miles, but normally go southeast of the house to Appaloosa Ridge. 6 TT 999-1002, 1005-06. She testified that she sometimes sees Hopi cattle grazing around this area. 6 TT 1006.

Alice Edison has fields at her home, and her father has one within the Buck Pasture; it appears neither of the fields were planted this year. 6 TT 1002-03, 1006.

26. *Helen George*, 43 years old, has been an elementary school teacher at the Tuba City Boarding School For 21 years. She has lived at Site 77 on Coal Mine Mesa for 25 years, and commutes the 18 miles into Tuba City every day during the school year. Her mother, brother, older daughter, son-in-law and grandchild live with her at Site 77. Another son and daughter live at Site 77 part-time; her son is in the military, and her younger daughter goes to school in Flagstaff. There are three hogans, a ramada, and a sheep and horse corral at Site 77. 6 TT 1010-12. Dr. Russell confirmed that George and her family live at this site. 4 TT 566-67.

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George testified that she owns 18 sheep and goats, no cattle, and 1 horse. 6 TT 1013-14. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (George permitted 15 SUs, and in 1991 had 18 sheep and goats and 1 horse, for a total of 23 SUs in 1991): *see also*, 4 TT 566-67 (Dr. Russell) (same).

During the summer, she and her brother take turns caring for the sheep: during the winter, her brother cares for them. 6 TT 1012-13. The sheep graze west and south in a three-mile radius around Site 77, south to Little Cowboy windmill, to Coal Mine windmill if Little Cowboy is not working, and west to Little Hollow Place if those are not working. 6 TT 1013-14.

George testified that she is related to Lillie Walker, who lives 1/2 mile south at Site 86. Lillie and Loren Walker have lived there full-time for about 29 years, and have no other residences. George testified that the Walkers have a cinder-block house, a ramada, a sheep and cattle corral, an earth hogan, and a corn field which was planted this year. The Walkers have 20 adult sheep and goats, 5 adult cattle, and 3 adult horses. They water their livestock at the same windmills her stock use. 6 TT 1015-18, 1020-21 .

See, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (Loren Walker permitted 60 SUs, and in 1991 had 20 sheep and goats, 6 cattle, and 6 horses, for a total of 74 SUs).

27. *Evelyn Flatrock*, age 60, testified that she and her husband Gee Flatrock have lived full-time at Site 57 for about 30 years. Their daughters Loretta and Jean also live at Site 57 full-time, and their daughter Angela returns every two weeks from her job in Albuquerque. Flatrock testified that there is a house at the site (built 25 years ago), as well as a hogan, ramada, horse corral, pig corral, and a garage. 6 TT 1023-26. Dr. Russell confirmed that the Flatrocks live at Site 57. 4 TT 531-33.

Flatrock testified that they have 12 cows (with 10 calves), 1 bull, and 3 horses, and that her husband Gee's permit allows 60 sheep units. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (Gee Flatrock permitted

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62 SUs; had 16 cattle and 4 horses in 1991, for a total of 84 SUs) 4 TT 531-33 (Dr. Russell) (Flatrocks had 14 cows and 4 horses in 1991).

She helps tend the livestock, and the cattle graze to the east, west and north about 2 miles, and water at Coal Mine windmill and Rock Pile windmill. If these windmills are not working, they must haul water from Tuba. The cattle do not graze to the south, since Highway 264 is less than one mile away. 6 TT 1027-29. She testified at her deposition that she has seen Hopi livestock at the Coal Mine and Rock Pile windmills. 6 TT 1030.

Flatrock planted a field next to their home this year. 6 TT 1029.

28. *Edith Billy*, 65 years old, is married to Tony Billy (a son of Henry and Yazzie Billy). When she married at age 19, she lived at Site 75B, 1 and 1/2 miles away from Henry and Yazzie (who were at Site 63); she and Tony Billy still use a cattle corral at Site 75B. 20 years ago, Edith Billy and her family moved to Site 75 next to the highway, where the family had a summer sheep camp, so that the children could catch the school bus. There are two houses at Site 75 (one owned by their daughter Maybelle), a ceremonial hogan, a horse corral and a hay barn. Edith has nine children; Corinna and Herman live at Site 75 full-time, and the other children store their belongings at the site because they do not have their own homes. 7 TT 1038-45.

Billy testified that she and her husband have 5 mature cattle, 2 horses, and 13 sheep, and that their permit allows 100 sheep units. She also testified that Maybelle has 12 sheep (including lambs), 7 goats, and 1 cow, and that Maybelle's permit allows 50 sheep units. 7 TT 1045-47. Dr. Russell testified that in 1991, Edith and Tony Billy had 6 sheep, 9 goats, 4 cows and 3 horses, for a total of 46 SUs.

See also, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (same; Tony Billy permitted 120 SUs; Maybelle's stock not included in the summary).

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Their animals graze together, and she, Tony, her son, and the grandchildren care for them; Maybelle cares for her stock every Sunday when she returns. The sheep water in Little Hollow Place, and in Hollow Place when it rains, and graze between Site 75 and these places. The cattle water at the Goldtooth and Little Cowboy windmills, and graze south of Site 75B. 7 TT 1045-50. Her livestock stay south of Highway 264. 7 TT 1067. She has seen Hopi cattle in the same area. 7 TT 1063.

Billy also testified that she has a field at Kerley Valley, which used to belong to her father: the field was planted this year. She is also an herbalist, and gathers medicinal plants. 7 TT 1050-51.

Edith Billy also testified about Frank Whiterock, Haskey Littleman, and Howard Begay. Frank Whiterock lives next to her at Site 56, and has lived there for a very long time. She testified that the Whiterocks own cattle, sheep and horses, although Edith did not know how many they own. 7 TT 1051-55. Dr. Russell testified that Frank Whiterock is permitted only 15 SUS, and had 3 horses, no cattle and no sheep in 1991. 4 TT 528-31. *See also*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (same). Billy testified that Whiterock's livestock waters in Little Hollow Place, and grazes in Hollow Place and Little Hollow Place. Frank and his wife Marlene have a home in Tuba City, where Marlene is caring for her grandmother. Edith sees Frank at the site "all the time", and everyone in the Whiterock family is there once a week on Sunday. 7 TT 1051-55.

Billy also testified that Haskey Littleman lives full-time at Site 58. Haskey owns cattle, which graze from Hollow Place to Little Hollow Place, in the same area Edith grazes her sheep. Haskey has a field at his home, which he planted this year. 6 TT 1055-57. Dr. Russell testified that Haskey Littleman is permitted 52 SUs, and had a total of 31 SUs in 1991. 4 TT 533-37; *see also*, Ex. 5603 (Dr. Russell's summary of Navajo live-stock holdings) (4 cattle and 3 horses in 1991).

Finally, Billy testified that Howard Begay lives at Site 79. Begay and his

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wife built a house at Site 79 before the Billy's house was built. He owns sheep and cows; Billy has seen him with 2 cows, and about 100 sheep. Billy testified that Begay waters his sheep at Little Hollow Place, and grazes north of Little Hollow, and in the same area Edith Billy grazes her sheep. 7 TT 1058-60. Dr. Russell testified that Howard Begay and his sister, Anna Begay Nez, had 61 sheep, 9 goats, and 1 horse in 1991, for a total of 75 SUs. 4 TT 568-69. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (same; permitted 75 SUs).

29. *Sally Yazzie*, 58 years old, testified that she lives full-time at Site 71 on Coal Mine Mesa south of Highway 264. She has lived in that house about 20-25 years, and her daughters Ida and Monica live there with her. There is also a hogan at the site, where she sometimes stays in the winter. Before moving to Site 71, she lived one mile north for over 40 years. 7 TT 1068-70, 1072-73. She testified that her son Loredo and his family also live at Site 71 full-time, in another house. 7 TT 1071. A third house at Site 71 belongs to her daughter Vida Hatatli; Vida and her husband return every Friday to the house, where they stay on weekends. 7 TT 1072. There are also three corrals at the site. 7 TT 1073-74.

Sally Yazzie also testified that she owns structures at Site 71 (diamond), including a hogan and a small house with a ramada. Until four years ago, she used to spend winters at this site. Although she testified that other people are now living there, there was no evidence regarding who lived at Site 71 (diamond), and it was classified as a non-residential structure by the Navajo Nation. 7 TT 1075-76.

Yazzie testified that her children have livestock, including 50 sheep, 10 goats, and about 20 cattle. Dr. Russell testified that in 1991, the Yazzies had only 11 sheep and 15 goats, for a total of 26 SUs. 4 TT 559-61. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (same; permitted 70 SUs). No information was given regarding Loredo Yazzie's cattle holdings.

Yazzie testified that the sheep and goats water at Little Cowboy windmill (as they have bee doing for 50 years). The family hauls water if necessary. Every

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Hosteenez,[30] Angela Rose Maloney,[31] Bennie Begay,[32] Kay

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day, she turns the water on at the Little Cowboy windmill for her son's cattle. 7 TT 1076-78.

Sally's mother, Sylvia Riggs, lived at Site 72, northwest of Site 71. Three weeks before trial, Sylvia moved to a nursing home, but before then was living with her children, rotating between their homes. Sally's sisters Evelyn and Jean still live at Site 72 full-time with their children. 7 TT 1078-83, 1091-93. Dr. Russell testified that in 1991, Sylvia Riggs had 9 cows and 6 horse, for a total of 66 SUs. 4 TT 561-62. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (same; permitted 32 SUs). There was no evidence presented whether Evelyn and Jean now have these livestock since their mother moved to a nursing home.

Sally Yazzie also testified that her cousin, Anna Nez Begay, has lived at Site 74 about 40 years. Anna's children now live in Tuba City, and Anna cares for three of her sons with health problems there. Yazzie testified that Anna still comes out to Site 74 every day, and sometimes stays overnight. As discussed previously, Anna Begay Nez and her brother Howard Begay had 61 sheep, 9 goats, and 1 horse in 1991. 4 TT 568-69 (Dr. Russell). Anna waters her sheep at Little Cowboy windmill, and sometimes hauls water. 7 TT 1083-86.

Sally Yazzie's younger brother. Kenneth Lee Begay, lives at Site 76 with his wife and grandchild. Kenneth also has a home in Tuba City where he works, and he sometimes stays overnight there. Kenneth's daughter Lavonne Begay lives at Site 76 with her husband and 3 children. Yazzie also testified that Kenneth has cattle, which she sees at Little Cowboy windmill every afternoon, though she does not know how many he has. 7 TT 1086-90. Dr. Russell testified that Kenneth had 9 cows and 2 horses in 1991, for a total of 46 SUs. 4 TT 565-66. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (same; permitted 40 SUs).

30. *Alfred Hosteenez*, 80 years old, lives with his wife at Site 80 on Coal Mine Mesa. Five years ago, he moved to Site 80 from a location very near Site
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78, where Dewey Zahne presently lives. Alfred's son Benson and his family live in the same house as Alfred and his wife. Alfred's daughter Marie and her family live part-time in a hogan at Site 80; they have another house in Provo, Utah, for which they received relocation benefits, which they are now renting. Marie also has trailer in Tuba City which functions as a fabric store, and at which she and her family sometimes stay overnight. 7 TT 1097-1102.

Hosteenez testified that he, his wife, and children have livestock which graze together. He has 70 cattle and horses (mature and young) which graze at a place called "Beginning of the Flow" down in Coal Mine Canyon, where they water at streams and small ponds in the canyon. His stock also water at "White horse pulls the wagon (or Whitehorse windmill) when there is no water in Coal Mine Canyon, but he herds them back into the canyon. He has a corral at Site 80, and two down in the Canyon (Sites 80B and 80C). Since the livestock must cross Highway 264 to get to Coal Mine Canyon from his homesite, he transports them to the corrals in coal Mine Canyon. 7 TT 1103-07. He also has 40 sheep and goats (mature and young), which graze behind his home to Little Cowboy windmill; occasionally he takes the sheep to Little Hollow Place when there is no water at Little Cowboy. 7 TT 1107-08. Dr. Russell testified that in 1991, Hosteenez had 6 sheep, 10 goats, 39 cattle and 7 horses. 4 TT 569-73. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (same, for a total of 207 SUs in 1991; Hosteenez permitted 120 SUs).

31. *Angela Rose Maloney*, 42 years old, lives east of the Pasture Canyon Reservoir at Site 110. She has a graduate degree in Public Health Administration, and works at the Tuba City Hospital environmental health department; her husband works for Peabody Coal Company. Angela has lived at Site 110 since 1966, when her parents moved to the site. 7 TT 1112-14.

There are a number of structures at Site 110, including her mother's house, her house, 2 hogans, 2 ramadas, 4 storage sheds, 3 corrals, 1 garage, and a trailer. A number of people live at the site full-time: she, her husband, their five children, their oldest son's girlfriend and their son's two children live in her house; her mother, her two brothers, a sister-in-law, and four children live in her

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mother's house. Maloney's sister Mary Paslakai and her family, who have a home in Cameron, come to the site daily, and stay once a week at the Maloney's home. 7 TT 114-15. Unlike most Navajo sites seen in this trial, Site 110 has electricity and a septic system which the Maloneys obtained before the Bennett Freeze went into effect. 7 TT 1130.

Maloney also testified regarding nearby sites in the Pasture Canyon area: Elliot Long lives full-time at Site 104; the Johnsons have lived at Site 98 full-time since 1966; Helen Drake and Katherine Tohannie have owned Site 108 since 1966, but now rent the site; Rachel Sanchez and her family have lived full-time at Site 100 since 1966; Betty Farrell has owned the house at Site 95 since 1966, but now rents the house; Mina Dallas has owned the house at Site 134 since 1966, and now rents it to the Alcotts, who live there full-time; Tom Tohannie and his mother Lola Bilagody live at Site 97, mostly in the summer; and the Woody family lives at Site 89 full-time. She did not know who lives at Site 91, 96 or 101. 7 TT 1115-21.

Angela Maloney testified that she and her family have 80 sheep and goats and 5 horses, which they keep on the homesite. Dr. Russell did not provide information regarding Maloney's livestock. They graze on both sides of Pasture Canyon, and in the Canyon to Pasture Canyon Reservoir, where there are streams coming from the reservoir, and on both sides of the Reservoir. The Yazzie family, Elliot Long, and the Johnsons also water their livestock at the reservoir. 7 TT 1 122-24.

32. *Bennie Begay*, 56 years old, lives at Site 7 on Coal Mine Mesa. He is married to Eta Begay, and has 7 children. He is a contractor, but is not currently working. He also has a home in Kerley Valley at Site 7A, at which they stay during the school year. Bennie returns to the site on Coal Mine every week during the school year. Bennie grew up on Coal Mine, and lived 1 and 1/2 miles away until 1959, when the house at Site 7 was built. 7 TT 1132-34.

His younger brother, Kee Begay, and Kee's family also live at Site 7, as does Bennie's older sister Chee Begay Tohannie, his younger brother Tony
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Yazzie,[33] Eleanor Williams,[34] Lena Canyon,[35] Eddie Cly,[36] Faye Tso,[37] and Maria Wilson.[38]

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Begay, nephew Woody Begay, niece Irene McCabe, and Tony's in-laws, Sally and Harold McCabe. 7 TT 1134-37. Kee, Chee and Sally McCabe also spend time at Tuba City. 7 TT 1142-45.

Bennie Begay testified that he keeps his livestock at Site 7, which graze with livestock belonging to Tony, Kee, Woody and Irene. Begay testified that in total, they have 50 mature sheep, over 50 mature cattle, and 12 horses. Begay testified that his grazing permit allows 113 sheep units, Woody has over 100 sheep units on his grazing permit, and Chee Tohannie has about 50 on her permit. 7 TT 136-37. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (Bennie Begay, Joe Begay and Chee Tohannie permitted 163 SUs; in 1991, they had 12 sheep and goats, 26 cattle, and 5 horses for a total of 141 SUs. No information was provided regarding Woody Begay).

Bennie Begay testified that the livestock grazes east to the 1882 Reservation border fence, south to "Salty" windmill and Where the Hills End windmill, and to the Little Cowboy windmill. The livestock used to use the Bennie Begay windmill and the 3T-540 windmill, but they are out of order. 7 TT 1138-39. The livestock also grazes in Buck Pasture unit #2 in the winter; he received permission to graze in Buck Pasture from the chapter house since his paternal grandfather, Flatrock, grazed there before fence was built. It is Bennie's understanding that Flatrock and others with customary use areas in the Buck Pasture had agreed to "lend" the Buck Pasture to the BIA for 30 years, and that it would be given back to his family if it was no longer used by the BIA. Begay has a corral in the Buck Pasture, at Site 7D. 7 TT 1139-40.

33. *Kay Yazzie*, 70 years old, lives with his wife Nina at Site 55 on Coal Mine Mesa near "White Horse Pulls the Wagon", or Whitehorse windmill. Kay also has a home in Tuba City which he bought with relocation benefits; Kay has medical problems and must see the doctor in Tuba City. Kay moved to the 1934 Reservation when he was relocated from Rough Canyon in the Hopi Partitioned

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Lands about 10 years ago; Kay testified that his wife's family had rights to the area around Site 55. Kay's son Kee lives at Site 55 full-time, and cares for the sheep. 8 TT 1154-58.

They have livestock, including about 23 goats, 16 sheep, and 5 horses. Dr. Russell testified that Kay Yazzie had 62 SUs in 1991. 4 TT 525-28. *See also*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (Kay Yazzie permitted 30 SUs: in 1991, had 37 sheep and goats and 5 horses). Kee cares for the animals, though Kay sometimes helps. The sheep water at the Whitehorse windmill, and graze toward the "rock cliffs" (presumably Coal Mine Canyon). 8 TT 1161-62.

Kay also testified that he has two fields close to his home at Site 55, which he has been planting every year since he moved to this site. 8 TT 1160.

34. *Eleanor Willams*, 36 years old, moved to Site 121 on Coal Mine Mesa in 1986 with her husband Donald Williams and their seven children. The site was formerly a summer camp for Donald's family. From 1983-86, they lived at Site 78 with Donald's family; they moved from the HPL in 1983 after living there for one year. 8 TT 1166, 1173-74. Eleanor Williams is a Navajo language instructor in the Tuba City public schools; they had rented a home in Tuba City until recently, but now live full-time at Site 121. 8 TT 1174-75. The Williams have a mobile home, storage shed, horse corral and sweat bath at Site 121. 8 TT 1176.

Eleanor's father, Dewey Zahne, lives full-time at Site 78. He has lived in this area for a very long time, and had lived a few hundred yards east of Site 78 when Eleanor was born. Eleanor's brother Lawrence also lived at Site 78, but is now in the military. 8 TT 1166-68. There is a frame house, hogan, storage shed and ramada at this site. Her father plants a corn field to the north. 8 TT 1170.

Donald's parents, Nelson and Sally Williams, used to live at Site 69; Sally now lives in Tuba City. Goerge and Archie Williams, Donald's brothers, continue to live at Site 69. 8 TT 1170-71.

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Her father Dewey Zahne did have livestock, but he got rid of them and gave his grazing permit authorizing 50 sheep units to Eleanor. 8 TT 1168-70. Nelson Williams transferred his grazing permit for 60 sheep units to Donald Williams; she and Donald took over Nelson's cattle about 10 years ago. 8 TT 1172-73. They now have 17 mature cattle, and 3 horses. Dr. Russell testified that the Eleanor and Don Williams had 16 cattle and 1 horse in 1991, for a total of 69 SUs, and that Sally Williams had 11 sheep and 15 goats in 1991, for a total of 26 SUs. 4 TT 555-58. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (Don Williams permitted 60 SUs, had 7 cattle and 1 horse, or 33 SUs, in 1991; Eleanor Williams permitted 50 SUs, had 9 cattle, or 36 SUs, in 1991; Sally Williams permitted 70 SUs). Dr. Russell confirmed that Dewey Zahne transferred his permit to his daughter and now has no livestock. 4 TT 567-68. Presumably, George and Archie Williams continue to care for Sally Williams' livestock.

The cattle water at the Little Cowboy windmill, and at Little Hollow Place, Goldtooth windmill, Where the Hills End, and the Salt Water windmills if there is not enough water at Little Cowboy windmill. 8 TT 1177-78. She has also seen Hopi cattle in Little Hollow Place. 8 TT 1778.

35. *Lena Canyon*, 76 years old, is the daughter of Frank Goldtooth, who had extensive ranching operations in 1934. They first moved from Goldtooth Ranch on the Moenkopi Plateau (Site 120, diamond) to Kerley Valley in 1953. Lena and her husband Jefferson Canyon live at Site 45, and the Goldtooth family now occupies a number of other sites immediately north of Moenkopi Wash. 8 TT 1193-95. Ex. 5602 (Kerley Valley site map) (Site 30, 32, 33, 36, 37, 38, 39, 40, 42, and 45). See *also*, 5 TT 623-28 (Dr. Russell).

Lena Canyon farms a field on the south side of the Wash, which she began planting in 1956 and has planted every year. 8 TT 1193-95. She also owns a number of hogans and other structures south of the Wash, which now have ceremonial functions. The first hogan south of the Wash was built in 1956 as a residence for her mother. 8 TT 1196-97. The Goldtooths also farm a number of fields north of the Wash by their residences. 8 TT 1211-13. The fields north and

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south of the Wash are watered from the Wash when there is water. 8 TT 1211-13.

The fields west of the ceremonial hogans are farmed by Hopis. The bluff area between Lena Canyon's hogans and the Hopi fields has never been farmed. 8 TT 1197-98.

Lena now owns about 20 sheep and goats. She has leg problems and cannot herd the sheep, but her son and husband take the sheep out every day, taking turns with the fields and sheep. They herd the sheep to the top of Plateau, and water the sheep at Crater Well. They have been herding in this area since 1953. 8 TT 1198-1200. She owns three corrals on the Moenkopi Plateau (Sites 45, diamond, 45G, and 451) and two hogans on the Moenkopi Plateau (Site 45, diamond) in which a herder can spend the night if he or she cannot cross the Moenkopi Wash due to high water. 8 TT 1200-03.

The Goldtooth cattle are kept at Goldtooth Ranch (Site 120, diamond). In the winter, the cattle graze in the Buck Pasture, and in the summer, they generally graze outside the Buck Pasture toward the western rim of the Plateau, and north to Ale Manygoats' house (Site 54). 8 TT 12034. Dr. Russell testified that in 1991, Lena Canyon owned 11 sheep, 7 goats, 3 cows and 2 horses for a total of 40 SUs). 4 TT 582-84. *See also*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (same; Lena Canyon permitted 55 SUs, Other Goldtooths at Site 120 permitted 313 SUs, and owned a total of 109 SUs).

36. *Eddie Cly*, age 72, has lived at Site 44 on the western end of Kerley Valley, north of Moenkopi Wash, since 1942. 8 TT 1215-16. He has a field next to his residence, 8 TT 1216-17, 1222-26.

Cly testified that he owns sheep and goats, which he keeps in herd with sheep belonging to his mother-in-law Mary Bahi Lee and Tom Lee. He estimates that the total number of sheep is 120 mature animals, and they are kept in a corral next to his home. *See*, Ex. 5603 (Dr. Russell's summary of Navajo

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livest[illegible] holdings) (Eddie Cly and Mary Bahi Lee permitted 42 SUs; no livestock count for 1991; ; in 1990, owned 29 sheep and goats; Tom Lee's livestock not listed). Cly explained that his sheep count went from 29 in 1990 to 120 today because his sheep were counted separately from Mary Bahi Lee's and Tom Lee's sheep. 8 TT 1222.

Most of the time Cly herds the sheep below the cliff in Kerley Valley to the southwest, and the sheep water from the Wash. He testified that he also herds the sheep up the cliff to graze on the Moenkopi Plateau, and they water at the spring on top of cliff, one mile east of the sewer pond. The sheep graze south about 2 miles, and west to the cliffs. 8 TT 1217-21.

37. *Faye Tso,* 59 years old, lives part-time at Site 115, north of Moenkopi Wash, east of the Village of Moenkopi and Tuba City. She stays here overnight sometimes, and her children also stay here when they are out of school. Faye has another home in Tuba City. 8 TT 1250-53.

Tso testified that she has 20 cattle (including young), which use the Whitehorse windmill (south of the Wash), and the windmill north of Site 115 (at Lice Hill). 8 TT 1250. She also has 18 mature sheep and 15 goats, which she herds every day from her corral at Site 115. 8 TT 1253-55. In the summer, she grazes the sheep north of the Wash to the windmill; in the winter, she grazes them to Whitehorse windmill and to Coal Mine Canyon. 8 TT 1256-57. She also owns 6 horses. 8 TT 1255-556. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (Faye Tso permitted 60 SUs; in 1991, she had 21 sheep and goats, 8 cattle, and 8 horses, for a total of 93 SUs).

Tso also has a field in the "Many Peaches" allotment area. 8 TT 1259.

Faye Tso and her family used to live in the Tuba Junction area, south of Highway 264, within the present Moenkopi Administrative Unit. Their home burned down on September 18, 1973 when a drunk driver hit the butane tank at

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their homesite. The Hopi Tribe denied permission for the Tso's to rebuild at that site, and obtained a restraining order in Hopi Tribal Court to prevent them from rebuilding. 8 TT 1274-81.

Faye Tso also testified as to the use of other sites. She testified that Lillie Holgate has lived at Site 113 for 50 years and also has a home in Tuba City. Lillie has sheep, goats, cattle and horses; the sheep graze south of the highway to the Wash, and the cattle and horses graze out to Site 115. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (Lillie Holgate is permitted 160 SUs; in 1991, she had 8 cattle and 3 horses, for a total of 47 SUs). Lillie has another house at Site 113 (diamond), although it is not used; Lillie has a field at this site. 8 TT 1230-34.

Faye Tso also testified that Stella Watson has lived at Site 114 for over 20 years. Stella's son and his children also live there full-time. Stella has livestock, including sheep, cattle, horses, and goats. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (Stella Watson is permitted 20 SUs; in 1991, she had 12 sheep and goats, 7 cattle and 5 horses, for a total of 65 SUs). The cattle and horses graze east along wash, south to Moenkopi Plateau, and east to the 1882 Reservation border, although they mostly stay around the site north of the Wash.

Finally, Tso testified that her sister, Blanche Taho, has a house east of Moenkopi at Site 116. Blanche is married to Mark Taho, a Hopi originally from Oraibi. Tso testified that Blanche has over 100 mature cattle; all of the cattle belong to Blanche, not her husband, although Mark helps in the care of the cattle. Blanche has a grazing permit from their father (he divided his permit into three for his three children); Blanche bought her brother Paul's permit, and also bought another permit from a Navajo. 8 TT 1241-44, 1285-86. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (Blanche Taho is permitted 350 SUs; in 1991, she had 21 cattle, for a total of 84 SUs). Blanche grazes along the Wash, north to the Lice Hill windmill, and south to the Whitehorse windmill, and to Coal Mine Canyon. Sam Begody (her father's brother, uses the same area for his cattle. 8 TT 1245-49. It is probable that not all of Taho's cattle were counted since a number of people testified that they had

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Dr. Scott Russell, who testified extensively in Phase I of this case regarding Navajo use in 1934, also testified in this trial

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over 100 cattle. In 1990, Blanche Taho had 181 cattle. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings).

38. *Maria Wilson*, age 53, lives in Tuba City with her husband and five children. Her husband, Paul Jim Wilson, works at the Tuba City True Value hardware store. 8 TT 1291-92.

Maria Wilson has a cattle and horse corral at Site 90, and a horse corral at their homesite in Tuba City. Her brother John Neztsosie and her uncle Kee Benally live in the house at Site 90 full-time. Her father, Hunter Neztsosie, also lived at this site prior to his death in 1989. 8 TT 1295-1300.

Maria has 8 cattle and 1 horse. Her brothers and sisters also have cattle and horses: Clyde Neztsosie has 28 cattle, and John Neztsosie, Louise Secody, and Lucita Johnson each have a few cattle. Maria has a grazing permit through her husband which allows 30 sheep units, and also shares a grazing permit with her brothers and sisters which allows 236 sheep units. 8 TT 1293-95. *See*, Ex. 5603 (Dr. Russell's summary of Navajo livestock holdings) (John Neztsosie permitted 236 SUs; in 1991, he had 37 cattle and 1 horse, for a total of 153 SUS; no information was given for Paul Jim, Maria Wilson, Clyde Nezrsosie Louise Secody, or Lucita Johnson).

She, her brothers and sisters, and her children take care of the cattle. The cattle graze one mile east, and 6-10 miles north of Pasture Canyon. They try to keep the cattle on the east side of the canyon, up to Castle Rocks. The cattle water at Pasture Canyon Reservoir, and at the springs in the canyon north of the Navajo fields. 8 TT 1 300-02 .

Wilson also testified that Elliot Long lives east of Pasture Canyon at Site 104, and has lived there as long as she can remember. He also waters his sheep and goats at the reservoir. 8 TT 1303. Other Navajos water at the reservoir, including Victor Denetso, Jack Watson, the Johnsons, and the Hardy family. 8 TT 1304.

regarding current Navajo use of this area. His testimony is cited with reference to the testimony of the individuals, above. He represented his opinion of Navajo use on Ex. 5001, on which he plotted all current Navajo residences and non-residential structures. His opinion regarding use in Kerley Valley is plotted on a more detailed map, Ex. 5002. Dr. Russell also constructed a list of all the people who were, in his opinion, part-time or full-time residents or "principal users" [39] of each site. *See*, Ex. 5565A. Further, Dr. Russell collected photographs of the main structures at each site, constructed genealogies of the principals at each site,[40] and excerpted 1991, 1990, 1989 and 1968 BIA grazing records for Navajos with livestock. *See*, Ex. 5602. The information from the BIA grazing records for Navajos are summarized in Ex. 5603. (Information from 1991 BIA grazing records for Hopis are summarized in Ex. 5606.) Dr. Russell did not investigate what areas were grazed by Navajo livestock.

Many Navajos in this area, especially the older ones, live full-time at their homesites on Coal Mine Mesa and the Moenkopi Plateau. Many others live part-time in Tuba City (or other towns on the Reservation) and part-time (generally weekends and summers) at their homesites. This part-time use of the homesites is important to these people; often many generations have lived at these home-sites (or sites close by within a customary use area), and their periodic return is necessary for conducting livestock operations. Thus, the Court

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39. Dr. Russell defined a principal user as someone who owned livestock or structures at the site, but lived elsewhere. Dr. Russell did not gather information on the amount of time spent at the sites by the residents and users or whether they had another home.

40. Many of the Navajos living in Kerley Valley and on the Moenkopi Plateau and Coal Mine Mesa are closely related.

will attempt, as much as is possible, to place full-time and part-time residences of Navajos on land partitioned to the Navajo Nation. (All Hopi residences and ranch sites will be within land partitioned to the Hopi Tribe.)

Navajo grazing is intensive in and around Pasture Canyon, on the northeastern section of the Moenkopi Plateau (north and south of Moenkopi Wash), south along coal Mine Canyon to Highway 264, and west to Hollow Place. South of Highway 264, Navajo grazing is intensive within Hollow Place and Little Hollow Place, to Goldtooth windmill, and around the Buck Pasture fence to Little Cowboy windmill, Where the Hills End windmill, and the Salt Water windmill. Navajos also graze in the Buck Pasture, along the western escarpment of the Moenkopi Plateau, and on the northwestern section of the Moenkopi Plateau. Most of the area intensively grazed by Navajos will be partitioned to the Navajo Nation.

The water sources most intensively used by Navajos for grazing livestock include the Pasture Canyon Reservoir, Moenkopi Wash, the windmill north of Lice Hill, Whitehorse windmill, Rock Pile windmill, Coal Mine Mesa windmill, Little Cowboy windmill, Goldtooth windmill, Little Hollow Place windmill, and the southern springs on the western escarpment of the Moenkopi Plateau (including Spring on the Rocks and View Point Well). Fewer Navajo livestock use the Salt Water windmill, Where the Hills End windmill, and the water sources on the northwestern Plateau (including Crater Well and a few natural springs). Most of the water sources used intensively by Navajo livestock will be partitioned to the Navajo Nation.[41]

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41. The Lice Hill, Whitehorse, Little Cowboy, Salt Water and Where the Hills End windmills are not within the 1934 joint use area, and cannot be partitioned to the Hopi Tribe.

Appendix C

Navajos farm in Pasture Canyon in the old "Government Pasture" area (north of the Hopi farms), and in the Moenkopi Wash/Kerley Valley, west of the Village of Mioenkopi. Most of the latter farms are in the Navajo allotments or north of the Moenkopi Wash. Further, many Navajos have fields at their homesites on Coal Mine Mesa or the Moenkopi Plateau. All of the land on hich Navajo farms are located will be partitioned to the Navajo Nation.

III. *The Bennett Freeze*

In 1966, Robert L. Bennett, then Commissioner of Indian Affairs, established the "Bennett Freeze", which required Hopi consent for actions that "hypothecate the surface or sub-surface resources for exploration, mining, rights-of-way, traders, or other use or occupancy authorized by permit, lease or license." *See*, Ex. 5252 (Letter from Robert Bennett to Graham E. Holmes, Area Director, July 8, 1966). This restriction applied to that part of the 1934 Reservation lying west of the 1882 Reservation and bounded on the north and south by westerly extensions of the northern and southern boundaries of the 1882 Reservation, to the western border of the Navajo Reservation. The Bennett Freeze was intended to protect the interests of the Hopi Tribe pending any negotiated, Congressional, or court resolution of Hopi and Navajo property interests in the 1934 Reservation.

On August 4, 1972, the Freeze was lifted in the Tuba City and Moenkopi Administrative Units (areas immediately surrounding Tuba City and Moenkopi, as defined by the Department of Interior) with respect to "leases, permits, rights-of-way, and other transactions affecting real property interest." Thus, development could take place in the Tuba City Administrative Unit without the consent of the Hopi Tribe, and

development could take place in the Moenkopi Administrative Unit without the consent of the Navajo Nation. *See*, Ex. 5048 (Letter from Harrison Loesch, Assistant Secretary of the Interior to Peter MacDonald, Chairman of the Navajo Tribal Council, August 4, 1972). Loesch's letter noted that the lifting of the Freeze in the Administrative Units was not intended to prejudice the interests of either tribe in the resolution of their respective rights to the 1934 Reservation.

The Freeze was codified in 1974 by 25 U.S.C. § 640d-9. That section provided:

> Any development of lands in litigation pursuant to section 640d-7 of this title and further defined as "that portion of the Navajo Reservation lying west of the Executive Order Reservation of 1882 and bounded on the north and south by westerly extension, to the reservation line, of the northern and southern boundaries of said Executive Order Reservation," shall be carried out only upon the written consent of each tribe except for the limited areas around the village of Moenkopi and around Tuba City. Each such area has been heretofore designated by the Secretary. "Development" as used herein shall mean any new construction[42] or

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42. "New construction" was first defined in relation to the 1882 Reservation dispute, in CIV 58-579. In an order citing Peter MacDonald, then Chairman of the Navajo Tribal Council, for contempt on May 29, 1974, the District Court found that "new construction" had taken place in violation of the Court's October 14, 1972 Order granting the Hopi Tribe's request for a writ of

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> improvement to the property and further includes public work projects, power and water lines, public agency improvements, and associated rights-of-way.

Section 640d-9 was amended in 1988, requiring the Tribes to respond to requests for development or construction within 30 days, and providing an administrative appeal procedure if one Tribe refused to give consent to development.

Clayton Honyumptewa, Director of the Office of Hopi Lands for the Hopi Tribe, testified about the responsibilities of his office for the enforcement of the Bennett Freeze. *See generally*, 9 TT 1398-1425 (Honyumptewa). Since 1982, the Office has monitored the Bennett Freeze area for "illegal

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assistance. The Court defined new construction as that which did not replace a burned or dilapidated building or add to existing buildings. The original judgment of partition of the 1882 Reservation, entered on February 10, 1977, and the final judgment of partition, entered on April 18, 1979, similarly ordered that no "new construction" could be commenced by the Navajos on the HPL without the authorization of the Hopi Tribe. *See also, Sidney v. MacDonald*, 536 F.Supp. 420, 426 (D.Ariz.1982), *aff'd*, 718 F.2d 1453 (9th Cir. 1983) (order finding Chairman MacDonald in contempt recognized that new construction did not include "construction that merely replaces a burned or dilapidated building or construction that adds to an existing building").

In 1988, this Court applied the same definition of "new construction" to the 1934 Reservation dispute when it issued an injunction against the Navajo Nation which required it to make written application to the Hopi Tribe and the BIA for any construction or development activities in the Bennett Freeze area and on the HPL. If either the Hopi Tribe or the BIA disapproved the application, the Court provided that the Navajo Nation could petition the Court for review. *See*, CIV 58-579, document #834, September 26, 1988.

construction" (i.e. new construction or development), including limited helicopter surveillance of the approximately 2 million acres of the Bennett Freeze area.

The Hopi Tribe contends that any structures built in violation of the Freeze should not influence this Court's decision in partitioning land to the Navajo Nation, because the Freeze was intended to protect Hopi rights to the land in the face of growing Navajo population and development.

Much evidence was introduced by both parties regarding the date at which structures were constructed. The Navajo Nation introduced the testimony of David Brugge, an anthropologist who had done field work in 1967 regarding Navajo use of the area in question. During this time, he had been employed by the Navajo Nation to assist in developing information for the use of Navajo negotiators in the land dispute. He was hired in this case to "retrace his steps" to establish the continuity of Navajo use from 1967 to date. He plotted his findings of past, compared to current, Navajo use on Ex. 5579. *See also*, Ex. 5579B (chart comparing Brugge site numbers with Russell site numbers). The Navajo Nation introduced Brugge's testimony to rebut any Hopi claim that Navajo sites were established after the imposition of the Bennett Freeze. The Navajo Nation also introduced the testimony of Dr. William Graf, a professor of geography from Arizona State University, who interpreted aerial photographs from 1952, 1968, and 1979. His opinion of the 1968 aerial photographs largely corroborated David Brugge's testimony.

However, with few exceptions, this Court will not consider the date of construction of structures; most of the Navajo sites fall within the areas where Navajo families have been since before 1966, and the date of construction of structures, or the

relocation of structures within these areas does not affect the equitable considerations in this case. Some of the Hopi structures were built after the imposition of the Bennett Freeze, as well, but ares within area used by Hopis prior to 1966.

The Bennett Freeze was an administrative, and later statutory, mechanism designed to maintain the "status quo" on the disputed lands in the 1934 Reservation and to prevent contemporary development from affecting the rights of either party. This Court will consider the date of occupation or construction of structures only if there was "new construction located outside of a prior use area[43] which was not approved by the Hopi Tribe.[44]

The Hopi Tribe pointed to only three Bennett Freeze violations of *new* construction, versus replacement of old homes or repairs. All three were located within a prior use area.

One of these alleged "new construction" violators was Kay Yazzie, who built a hogan at Site 55 in 1982 after relocating from the Hopi Partitioned Lands. Blanche Taho, a Navajo who grazed her cattle in this area, notified the Office of Hopi Lands that Kay Yazzie had constructed a hogan at this site. The field report, Ex.

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43. The Court has purposely avoided using the phrase "traditional use area" or "customary use area", given the indefinite nature of such an area and the extensive acreage claimed by family units under this rubric. A traditional use area is also a shifting target, subject to change with climatic conditions, size of herds, herd management practices, the types of animals grazed (sheep, cattle, or horses), the number of family members using the area, etc.

44. Clayton Honyumptewa testified that the Hopi Tribal Council must approve any new residential construction in the Bennett Freeze area, and has never done so. 9 TT 1414 (Honyumptewa).

4221A, dated May 13, 1982, indicates that Yazzie was notified of the violation, and stated that he would not move. 9 TT 1402-05 (Honyumptewa). The Hopi Tribe did not seek to evict Mr. Yazzie. 9 TT 1422-23 (Honyumptewa). Kay Yazzie testified that his wife's family had rights to the area around Site 55 (i.e. it was part of their prior use area). 8 TT 1154-58 (Yazzie). This was not contradicted by the Hopi Tribe.

A second alleged new construction violation was recorded at Site 121, the homesite of Donald and Eleanor Williams. The field report, Ex. 4221B, dated November 17, 1988, indicates that Mr. Honyumptewa, then a field monitor talked with Donald Williams about the mobile home trailer that Williams said had previously been located about 3 and 1/2 miles south of Site 121. Mr. Williams was informed of the Freeze violation, and referred to the Navajo-Hopi Development Office for assistance. A second field report, Ex. 4221C, dated October 10,1989, reported that further structures had been erected including a wood frame house, two corrals, a sweat lodge, and fencing. A notice was posted on his trailer door that day. A third field trip report, Ex. 4221D, dated December 12, 1991, indicated that the structures were still at the site; no notice was posted or given to Mr. Williams that day. 9 TT 1406-1409 (Honyumptewa). The Hopi Tribe did not seek to evict the Williams from Site 121. 9 TT 1422-23 (Honyumptewa).

Eleanor Williams testified that they moved onto this site in 1986, and that it was formerly a summer camp for Donald's family on which there was a ramada. 8 TT 1166,1173-74. Although Clayton Honyumptewa testified that he had not seen a ramada at the site since he began working for the Office of Hopi Lands five years ago, 9 TT 1421 (Honyumptewa), the Hopi Tribe did not contradict Eleanor Williams' testimony that the site had been a prior use area of the Williams family.

Appendix C

The Hopis claim that the third site which should not be considered by the Court is Site 60, where Glenmore Begay built a new hogan after the Hopi Tribe tore down the hogan previously inhabited by his father Herbert Zahne. *See*, 6 TT 971-71 (Julia Hadley). The Hopi Tribe originally considered the new hogan to be a violation of the Freeze, but reconsidered and approved the structure, upon condition that the new construction would not be asserted by the Navajo Nation in a way contrary to the Hopi Tribe's interest in this litigation. This Court finds, in any event, that this site was used by Glenmore Begay's family prior to the construction of his hogan. Further, this site is outside of the 1934 jointly used area and is not subject to partition to the Hopi Tribe.

Finally, 25 U.S.C. § 640d-9 prevents development of lands "in litigation". In its final judgment, this Court will order the Bennett Freeze lifted, pending any appeal that might be taken. Residents of the Western Navajo Reservation, both Navajo and Hopi, have waited long enough to see this litigation resolved, and it would be inequitable to continue the restrictions on repair and addition to homes and the development of services essential for comfort and sanitation.

IV. *Partition*

The Court's partition line is represented on App. A to this opinion.

On the west, the partition line begins at the western edge of the Hopi farms in the "Masaaw" region south of Moenkopi Wash (Hopi field 3.8), travels south to the Moenkopi Plateau, and west to the western escarpment of the Moenkopi Plateau (excluding the Tuba City sewage lagoons). The partition line then travels down the western escarpment of Moenkopi Plateau (at the 4900-

foot contour) to a point immediately north of View Point Well. From View Point Well, it travels east to a point directly south of the mid-point of Little Hollow Place. The partition line then turns directly north, passing immediately east of the structures and windmill in Little Hollow Place to Highway 264. The partition line then travels in a slight southeast direction along Highway 264, until it reaches a point directly south of Site 57. The partition line then turns north, passing immediately west of Site 57 to a point just north of Site 57. It then travels northeast to a point immediately west of Rock Pile windmill, and from that point turns directly north until it reaches the middle of Moenkopi Wash. The partition line then travels down the middle of Moenkopi Wash until the township line immediately east of Adams' Site 152 (from the Phase I trial), turns north and travels up the township line. The line then travels west until it meets the intersection between Highway 160 and Reservoir Canyon Pasture Canyon. The partition line then follows the eastern wall of Pasture Canyon, until it reaches the southern border of the old "Government Pasture" at the current Navajo farms, then travels across the Canyon and south again along the wall of the Canyon, travelling in a generally southerly extension across the park area to Highway 160. The partition line then follows Highway 160 until it hits the Navajo allotments, and travels along the eastern border of the Navajo allotments. The partition line then follows the base of the Moenkopi Plateau until it reaches the bluff between Lena Goldtooth Canyon's field and ceremonial hogan and the Hopi farms. The partition line will travel up the eastern side of this bluff until it reaches Moenkopi Wash, and then will travel west along the mid-point of the Wash until it reaches the western border of the Hopi farms in the "Masaaw" region, south of the Wash (where the partition line began).

The partition line takes a number of factors into account,

including (1) avoiding the relocation of individuals, (2) avoiding the disruption of grazing areas, as much as possible, (3) providing 50% of the joint use area acreage to the Hopi Tribe, to the extent possible, (4) fairly and equitably distributing water sources, and (5) ensuring the feasibility of future administration of the partitioned areas, including fencing. Each factor will be discussed in turn.

Although the Court has attempted to satisfy every factor, the most important factor is avoiding the relocation of individuals. Every Navajo homesite is located on land partitioned to the Navajo Nation, and every Hopi home and ranch site is located on land partitioned to the Hopi Tribe.

Second, to the extent possible, the partition line avoids the disruption of grazing areas and other use patterns. In all cases where some diminution of an individual's claimed grazing area has occurred, a reasonable grazing area remains intact or is adjacent to other areas grazed by members of the same Tribe.[45]

Third, while the Court attempted to partition 50% of the joint use area acreage to the Hopi Tribe it was not possible without including Navajo homesites on the land partitioned to the Hopi Tribe. The acreage of the Hopi exclusive area in 1934 was 22,675. The acreage of the joint use area was 152,843 acres

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45. The Court notes that Lena Canyon and Eddie Cly graze their sheep on the northeastern Moenkopi Plateau, which will be partitioned to the Hopi Tribe. However, Eddie Cly mainly grazes his sheep in Kerley Valley, below the Plateau cliff; this area in Kerley Valley is partitioned to the Navajo Nation and Eddie Cly will retain that portion of his grazing area. Lena Canyon will lose her grazing area on the Plateau; however, she now has only 20 sheep and goats, and nearby grazing areas in Kerley Valley which are a part of the Navajo Reservation can accommodate her needs.

(after subtracting the acreage of the excluded lands on the southern Moenkoppi Plateau). The partition line delineated in this Order gives the Hoopi Tribe 60,518 acres, which is the exclusive area acreage plus approximately 25% of the joint use area acreage.

Partition of less than 50% of the joint use area to the Hopi Tribe is an equitable result. Although the Court had held that Hopi use of the joint use area was substantial and sufficiently intensive to create a property interest, the evidence was clear that Hopi use was not as intensive as Navajo use of the joint use area in 1934, especially on the northeastern Moenkopi Plateau, Coal Mine Mesa and the southern Moenkopi Plateau. The evidence was not specific enough to quantify a percentage of Hopi use of the joint use area, but it is equitable that the Hopi Tribe receive less than 50% of the area. Further, all areas currently used — and used in any significant way by Hopis in 1934 are partitioned to the Hopi Tribe.[46]

Fourth, the Court attempted to distribute water sources equitably, so that every grazing area has access to water. The "Lazy Ranch" windmill, the Little Hollow Place windmill, the springs on the western escarpment of the Moenkopi Plateau north of View Point Well, the Owls Cap windmill, Crater Well and the springs on the northeastern Moenkopi Wash adjacent to their partitioned land.

The Navajos have as a part of their reservation the windmill

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46. It would have been possible to partition a part of Ward Terrace to the Hopi Tribe to achieve a 50/50 division of acreage without relocating Navajos. However, no Hopis use Ward Terrace, the Hopi Tribe did not request partition of that area, and some Navajo grazing areas would have been disrupted.

at Lice Hill, Whitehorse windmill, Rock Pile windmill, Coal Mine Mesa windmill, Little Cowboy windmill, Goldtooth windmill, the southern springs on the western escarpment of Moenkopi Plateau (Spring on the Rocks and View Point Well), Salt Water windmill, Where the Hills End windmill and the use of Moenkopi Wash adjacent to the land partitioned to the Navajos. Pasture Canyon Reservoir will be addressed in a later paragraph.

The windmill at Little Hollow Place is used intensively by Hopis (including Jonathan Phillips, Robert Charley, Pierson Honahni, and the Lazy Ranch outfit) and Navajos (including Haskey Littleman, Frank Whiterock, Tony Billy, Gee Flatrock, Howard Begay, Alice Edison, Helen George, Lillie Walker Edith Billy, and Eleanor Williams, some of whom haul water from this source). This windmill will be on land partitioned to the Hopi Tribe to avoid the relocation of the Hopi ranch sites in Little Hollow. Because the partition line is drawn immediately east of the windmill, the Hopi Tribe will be ordered to install a pipe from Little Hollow Place windmill to troughs outside the boundary line (on the assumption that a fence will be built). This pipe must deliver sufficient water for the livestock belonging to the Navajo individuals listed above, up to a maximum of one half of the water produced by Little Hollow Place windmill. The Hopi Tribe will be required to install the pipe within 90 days of a final order of partition; the pipe and any trough shall be maintained by the Navajo Nation.

Although Rock Pile windmill is also immediately adjacent to the partition line, no Hopi individual testified that they used that water source for their livestock. The Navajo Nation will therefore not be ordered to provide water from Rock Pile windmill to troughs inside the partition line.

Fifth, the partition line ensures the feasibility of future administration of the partitioned areas. The partition line is in straight lines when possible to facilitate fencing. Further, the western boundary of the land partitioned to the Hopi Tribe is the western escarpment of the Moenkopi Plateau, and part of the northern boundary follows the mid-point of Moenkopi Wash, so that no fencing is necessary in these areas.

It was not possible to make the land partitioned to the Hopi Tribe contiguous to the existing Hopi Reservation. The joint use area in 1934 did not extend to the border of the 1882 Reservation, and that area could thus not be partitioned to the Hopi Tribe. Moreover, the land partitioned to the Hopi Tribe is connected to the Hopi Reservation by Highway 264, which travels directly from the Village of Moenkopi to the Hopi villages on the mesas. In the modern world of transportation, this connection is perhaps more important than contiguity of land.[47]

A few areas require special consideration, including the partition of Pasture Canyon, the partition to the Navajo Nation of land north of the Moenkopi Wash at the western end of Kerley Valley (on which two Hopi farms are located), and the partition to the Navajo Nation of land on which the Tuba City sewage lagoons are located.

In Pasture Canyon, the Hopi Tribe will be partitioned the land within Pasture Canyon from the southern border of the old "Government Pasture" (now the southern border of the Navajo farms), to Highway 160. Navajo Sites 108,103, and 110 will

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47. A similar circumstance occurred in the 1882 partition, wherein the Jeddito area partitioned to the Navajo Nation is surrounded by the Hopi Reservation.

remain on Navajo land, as the land partitioned to the Hopi Tribe is restricted to the confines of the canyon walls, and a southerly extension of the canyon walls to Highway 160. Across Highway 160, this connects with "Reservoir Canyon", which also will be partitioned to the Hopi Tribe.

The area partitioned to the Hopi Tribe includes the Hopi farms south of the old Government Pasture, Pasture Canyon Reservoir, and the park area which extends south from Pasture Canyon Reservoir to Highway 160. This Court will order that as long as the land south of the Reservoir remains a park area, the public has a license and/or easement to utilize the park for recreational purposes. If the area ceases to be used as a park, the Hopi Tribe may petition the Court for termination of the license and/or easement after public notice and hearing.

Pasture Canyon Reservoir is partitioned to the Hopi Tribe because there was substantial evidence that Hopis have always maintained the Reservoir and its irrigation system.[48] The

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48. Alton Honahni, Sr. testified that he was on the Moenkopi Irrigation Committee from 1963-1975; the Irrigation Committee took care of the reservoir and irrigation ditches in Pasture Canyon and the ditches running from the highway to the Hopi allotted land. Each year, the Committee cleaned out the ditches coming from the springs at the top of Pasture Canyon (north of the old Government Pasture); no Navajos helped with this work. The Irrigation Committee also notified Hopis when it was their turn to use the water. Honahni testified that two Navajos, Harry and Albert Goldtooth, had once asked for permission to use the Pasture Canyon water, the Hopis denied this request when they decided that there was not enough water for the Navajos. 2 TT 384-387.

William Numkena testified that Hopi men maintained the irrigation ditches in Pasture Canyon as a group effort when he was young, and that each

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irrigation ditches running through the Navajo farms in the old Government Pasture from springs at the head of Pasture Canyon must be maintained in order to ensure that water flows to the reservoir. The evidence shows that at least some of the Navajos farming in Pasture Canyon have not adequately maintained the irrigation ditches running across their farms.[49] The Court will thus grant the Hopi Tribe an easement to maintain the ditches running across the Navajo farms, with access for those purposes to occur after reasonable notice to the Navajo Nation and to the individual Navajos farming in Pasture Canyon. This Court will retain jurisdiction to consider any injunctive relief and/or

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farmer now maintains the ditch that passes through his section of the land. 2 TT 218-219.

Gilbert Naseyowma testified that Hopis have been maintaining Pasture Canyon Reservoir for as long as he can remember. There is a committee of those Hopis who use the water from Pasture Canyon Reservoir, and those who use the water must clean the irrigation ditches. He testified that only the members of this committee, including he, Loren Phillips, Alfred Elmer, and Silas Ponyah, have keys to the padlocks on the water gates at the reservoir; when the reservoir gates are opened, water flows into a lower reservoir, and then into pipelines which take the water across the highway to the Hopi fields. 2 TT 339-41.

Eugene Kaye testified that only Hopis have worked on the irrigation ditches in Pasture Canyon. 3 TT 452-53. None of this testimony was contradicted by the Navajo Nation.

49. Although William Numkena testified that Navajos have not "interfered" with the water in Pasture Canyon, 2 TT 2335, Eugene Kaye testified that the Navajos farming in the old Government Pasture area do not clean their sections of the irrigation ditches and allow livestock to graze by the ditches; this causes the irrigation ditches to flood the northern Hopi fields, and less water flows into the Reservoir. 3 TT452-53.

damages claims against the Navajo Nation respecting disturbance or damage to the irrigation ditches by Navajo individuals or livestock.

There was evidence that a number of Navajos water and graze livestock within Pasture Canyon.[50] This Court will grant those Navajo families presently using Pasture Canyon Reservoir a license and/or easement to water their livestock. This license and/or easement does not extend to grazing Navajo livestock within the section of Pasture Canyon partitioned to the Hopis, including at the sides of the Reservoir (except for that grazing impossible to prevent while watering animals). If the Hopi Tribe chooses to build a pipeline from the Reservoir to troughs on the eastern and western sides of the Reservoir (outside of the boundary), or some other measure which will ensure a continuous water supply for Navajo livestock, the Hopi Tribe may petition this Court for termination of the license and/or easement.

Next, in order to arrive at a partition line which was administratively feasible, the Court avoided the creation of small "islands" of Hopi or Navajo land within land partitioned to the other Tribe. Thus, the Court will partition land on the north

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50. Maria Wilson and her family graze approximately 37 cattle on the east side of Pasture Canyon up to Castle Rocks, and water them at Pasture Canyon Reservoir and at springs in the canyon north of the Navajo fields. 8 TT 1300-02. Wilson also testified that Elliot Long, Victor Denetso, Jack Watson, the Johnsons, and the Hardy family water their livestock at the Reservoir. 8TT 303-04. Also, Angela Maloney testified that she and her family have 80 sheep and goats which they graze on both sides of Pasture Canyon, in the Canyon to the Reservoir, and on both sides of the Reservoir. She also testified that the Yazzie family, Elliot Long, and the Johnsons water their livestock at the Reservoir. 7 TT 1122-24.

side of Moenkopi Wash at the western end of Kerley Valley to the Navajo Nation. A few Hopi farms are located in this area, including fields belonging to Eugene Kaye and Steven Albert. *See*, Ex. 4437 (Honyumptewa's map of farms in Kerley Valley). Eugene Kaye testified that he started farming this field only four years ago and it had generated very little production. Further, Kaye was not sure whether Albert had planted this field this year. 3 TT 444-45, 461. Eugene Kaye has other fields: a field southwest of the Village of Moenkopi Administrative Unit, a field east of the Village in the Moenkopi Spring area, and two fields in Pasture Canyon. 3 TT 442-43; *see*, Exs. 4437 and 4438. Steven Albert also has a farm in Reservoir Canyon (below Highway 160). *See*, Ex, 4437.

The only Navajo field on the south side of Moenkopi Wash belongs to Lena Canyon; [51] she also has ceremonial hogans and other structures south of the wash. 8 TT 1193-75. However, since this is adjacent to the Navajo allotments, which extend south of the Wash and will be partitioned to the Navajo Nation, partitioning Lena Canyon's field and ceremonial area to the Navajo Nation will not create an "island" of Navajo interest. The partition line will be drawn immediately east of the bluff separating Canyon's field and ceremonial area from the Hopi farms south of the Wash.

Next, the land on which the Tuba City sewage lagoons are located will be partitioned to the Navajo Nation. There is no current Hopi use south of Moenkopi Wash west of the Hopi farms

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51. Although Ex. 4469 shows four Navajo fields south of the Wash, the evidence at trial demonstrated that only Lena Canyon farmed south of the Wash, and the Navajo proposed partition line included these other fields in the Hopi area.

in the "Masaaw" area. Further, the sewage lagoons were built with Navajo tribal funds and a grant from the Public Health Service. *See*, Ex. 5513 (Memo from General Superintendent, Navajo Agency, to Area Director, dated June 30, 1965). The Navajo Nation and Hopi Tribe agreed that the Navajo Nation could construct the sewage lagoons if the Village of Moenkopi could utilize the sewage services in a non-discriminatory manner. *See*, Ex. 4132 (Memo from Irving Billy, Tuba City Agency Superintendent, to Area Director, Navajo Area Office, dated July 8,1981, and attached agreement). Any agreements between the Navajo Nation and Hopi Tribe regarding the use of the sewage lagoons are unaffected by this partition.

CONCLUSIONS OF LAW

The Navajo-Hopi Land Settlement Act, 25 U.S.C. § 640d *et seq.*, grants this Court jurisdiction to settle title to the 1934 Reservation. 25 U.S.C. § 640d-7 provides that lands in which the Court found the Navajo have exclusive interest will remain a part of the Navajo Reservation, that lands in which the Hopi have an exclusive interest will become a reservation for the Hopi Tribe, and that lands in which the Navajo and Hopi have a joint or undivided interest shall be partitioned by the Court "on the basis of fairness and equity".

Both the surface and subsurface rights to the 1934 Reservation will be partitioned. In the partition of the 1882 Reservation, only the surface rights were subject to partition. 25 U.S.C. § 640d-6 provides:

> Partition of the surface of the lands of the joint use area shall not affect the joint ownership status of the coal, oil, gas, and all

> other minerals within or underlying such lands . . .

Section 640d-6 does not apply to the areas jointly used by the Navajo and Hopi on the 1934 Reservation. Section 640d(a) specifies that the language "joint use area" in the statute refers to "lands within the reservation established by the Executive order of December 16,1882, except land management district no. 6."

The legislative history lends support for the conclusion that Congress intended this Court to partition the surface and subsurface rights to the 1934 Reservation. The title of the House report accompanying H.R. 10337, which amended, was adopted as the Navajo-Hopi Settlement Act, reads:

> "Authorizing the partition of the surface rights in the joint use area of the 1882 Executive order Hopi Reservation and the *surface and subsuface rights in the 1934 Navajo Reservation* between the Hopi and Navajo Tribes, providing for allotments to certain Paiute Indians, and for other purposes.

H.R.Rep. No. 93-909, 93rd Cong., 2nd Sess. (1974) (emphasis added). The Senate report accompanying H.R. 10337 also stated that the legislation was to "authorize the partition of . . . the surface and subsurface rights in the 1934 Navajo Reservation between the Hopi and Navajo Tribes." S.Rep. No. 93-1177, 93rd Cong., 2nd Sess. 1 (1974).

The Court's April 27, 1992 findings set forth the boundaries of the exclusive and joint use areas in 1934, and are more

specifically delineated in the Factual Findings, above. The boundaries for the exclusive and joint use areas are represented on Appendix A to this opinion.

The joint use area will be partitioned on the basis of "fairness and equity". The Navajo-Hopi Settlement Act does not give the Court guidelines for the application of "fairness and equity". The lack of standards in section 640d-7, as compared with section 640d-5 which listed detailed criteria for the partition of the 1882 Reservation, indicates that Congress intended to grant the Court broad discretion in the partition of the 1934 Reservation. Further, the absence of an "owelty" provision indicates that Congress did not intend equality of acreage and/or value to be mandatory in the partition of the 1934 Reservation.

The law of the case similarly does not mandate partition on the basis of equality of acreage and/or value. While the Hopi Tribe has a one half interest in the jointly occupied lands, *see Sekaquaptewa I*, 448 F.Supp. at 1996, *rev'd in part, Sekaquaptewa II*, 619 F.2d at 809 810, neither Court specifically considered the appropriate standards for partition. The June 2, 1978 Partial Judgment reserved all questions relating to the partition. Further, the Ninth Circuit did not direct the District Court on remand to partition jointly held lands on an equal basis, requiring only that the District Court "declare title to be joint or undivided, subject to partition." *Sekaquaptewa II*, 619 F.2d at 809.

All of the property partitioned to the Hopi Tribe shall be held in trust by the United States exclusively for the Hopi Tribe as part of the Hopi Reservation; all of the property partitioned to the Navajo Nation will be held in trust by the United States exclusively for the Navajo Nation as part of the Navajo

Reservation. Each will be held free from all interests of the other Tribe and its individual members, except as subject to the licenses and/or easements set forth in the Order of this Court. Lands partitioned to the Navajo Nation shall be subject to the jurisdiction of the Navajo Nation, to the same extent as is applicable to other potions of its reservation. 25 U.S.C. § 640d-9(e). Lands partitioned to the Hopi tribe shall be subject to the jurisdiction of the Hopi Tribe to the same extent as is applicable to other portions of its reservation. 25 U.S.C. § 640d-9(e).

The partition does not affect the title, possession, and enjoyment of lands allotted to Hopi and Navajo individuals for which patents have been issued. All Hopi allotments are located on land partitioned to the Hopi Tribe and those individuals will be subject to the jurisdiction of the Hopi Tribe. All Navajo allotments are located on land partitioned to the Navajo Nation and those individuals will be subject to the jurisdiction of the Navajo Nation. 25 U.S.C. § 640d-16.

Pursuant to 25 U.S.C. § 640d-18(b) and 18(c), the Secretary will be ordered to provide for the survey, location of monuments, and fencing of boundaries of the land partitioned to the Hopi Tribe, within twelve months of a final order of partition.

The Court's partition line is represented on App. A to this opinion. A description of the partition line is found in the Findings of Fact, above.

The partition takes a number of factors into account, including (1) avoiding the relocation of individuals, (2) avoiding the disruption of grazing and farming areas, to the extent possible, (3) providing 50% of the joint use area acreage to the

Hopi Tribe, to the extent possible, (4) equitably distributing water sources, and (5) ensuring the feasibility of future administration of the partitioned areas, including fencing. Some of these factors were set forth in section 604d-5 governing the partition of the 1882 Reservation; it is not mandatory that the Court employ section 640d-5(a)-(f) in the partition of the 1934 Reservation. *See, Sekaquaptewa II*, 619 F.2d at 807 ("the statute and order in *Healing* used different language in a different legislative setting than the 1934 Act.")

Of primary importance is avoiding relocation of individuals; every Navajo homesite is located on land partitioned to the Navajo Nation, and every Hopi home and ranch site is located on land partitioned to the Hopi Tribe. Further, where some diminution of an individual's claimed grazing area has occurred, a reasonable grazing area remains intact or is adjacent to other areas grazed by members of the same Tribe.

While the Court attempted to partition 50% of the joint use area acreage to the Hopi Tribe, it was not possible without including Navajo homesites on land partitioned to the Hopi Tribe, and thus entail the possibility of relocation. The acreage of the Hopi exclusive area in 1934 was 22,675 acres. The acreage of the joint use area was 152,843 acres (after subtracting the 14,976 acres of the excluded lands on the southern Moenkopi Plateau). The partition gives the Hopi Tribe 60,518 acres, which is the exclusive area acreage plus 25% of the joint use area acreage.

Partition of less than 50% of the joint use area to the Hopi Tribe is an equitable result. Although the Court had held that Hopi use of the joint use area was substantial and sufficiently intensive to create a property interest, the evidence was clear that

Appendix C

Hopi use was not as intensive as Navajo use of the joint use area in 1934, especially on the northeastern Moenkopi Plateau, Coal Mine Mesa and the southern Moenkopi Plateau. The evidence was not specific enough to quantify a percentage of Hopi use of the joint use area, but it is equitable that the Hopi Tribe receive less than 50% of the area. Further, all areas currently used in any significant way by Hopis are partitioned to the Hopi Tribe.

Finally, the Court concludes that violations of the Bennett Freeze and 25 U.S.C. § 640d-9 do not affect the equitable considerations in this case, as all of the Navajo sites alleged to be violations fall within the prior use areas of Navajo families. The Court will order the Bennett Freeze lifted.

In accordance with the above Findings of Fact and Conclusions of Law,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) The surface and subsurface lands of the 1934 Reservation are hereby partitioned between the Navajo Nation and the Hopi Tribe, in accordance with the description contained in the Findings of Fact, and as represented on Appendix A to this opinion.

(2) That all of the property partitioned to the Hopi Tribe as delineated above, shall be held in trust by the United States exclusively for the Hopi Tribe and as a part of the Hopi Reservation, and that the United States hold the same in trust for the Hopi Tribe severally and absolutely free from any and all claims of the Navajo Nation and the members thereof, except as hereinafter specifically set out.

(3) That all of the property partitioned to the Navajo Nation as delineated above, shall be held in trust by the United States exclusively for the Navajo Nation and as a part of the Navajo Reservation, and that the United States hold the same in trust for the Navajo Nation severally and absolutely free from any and all claims of the Hopi Tribe and the members thereof, except as hereinafter specifically set out.

(4) That lands partitioned to the Navajo Nation shall be subject to the jurisdiction of the Navajo Nation, to the same extent as is applicable to other portions of its reservation. 25 U.S.C. § 640d-9(e).

(5) That lands partitioned to the Hopi Tribe shall be subject to the jurisdiction of the Hopi Tribe to the same extent as is applicable to other portions of its reservation. 25 U.S.C. § 640d-9(e).

(6) That this Judgment does not affect the title, possession, and enjoyment of lands heretofore allotted to Hopi and Navajo individuals for which patents have been issued. All Hopi allotments are located on land partitioned to the Hopi Tribe, and those individuals shall be subject to the jurisdiction of the Hopi Tribe; all Navajo allotments are located on land partitioned to the Navajo Nation, and those individuals shall be subject to the jurisdiction of the Navajo Nation. 25 U.S.C. § 640d-16.

(7) That pursuant to 25 U.S.C. § 640d-18(b) and 18(c), the Secretary shall provide for the survey, location of monuments, and fencing of boundaries of the land partitioned to the Hopi Tribe, which shall be completed within twelve months of a final order of partition.

(8) That upon completion of said survey, the United States shall cause to be expeditiously filed with the Court a certified copy of the survey findings and determination.

(9) That the Hopi Tribe shall install a pipe from the Little Hollow Place windmill to troughs outside the boundary line, within 90 days of a final order of partition. This pipe must deliver sufficient water to provide for the livestock belonging to the Navajo individuals listed as users in the Findings of Fact, above, up to a maximum of one half of the water produced by Little Hollow Place windmill. The pipe and any trough shall be maintained by the Navajo Nation.

(10) That the public is granted a license and/or easement to utilize the park area south of Pasture Canyon Reservoir for recreational purposes. If this area ceases to be used as a park, the Hopi Tribe may petition this Court for termination of this license and/or easement after public notice and hearing.

(11) That the Hopi Tribe is granted a license and/or easement to maintain the ditches running across the Navajo farms in the northern part of Pasture Canyon, which access to occur only after adequate notice to the Navajo Nation and to the individual Navajos farming in Pasture Canyon.

(12) That the Navajos farming in Pasture Canyon shall prevent their stock from destroying or damaging the irrigation ditches running through the upper part of Pasture Canyon; this Court will retain jurisdiction to consider any injunctive relief and/or damages claims against the Navajo Nation respecting disturbance or damage to the irrigation ditches by Navajo individuals or livestock.

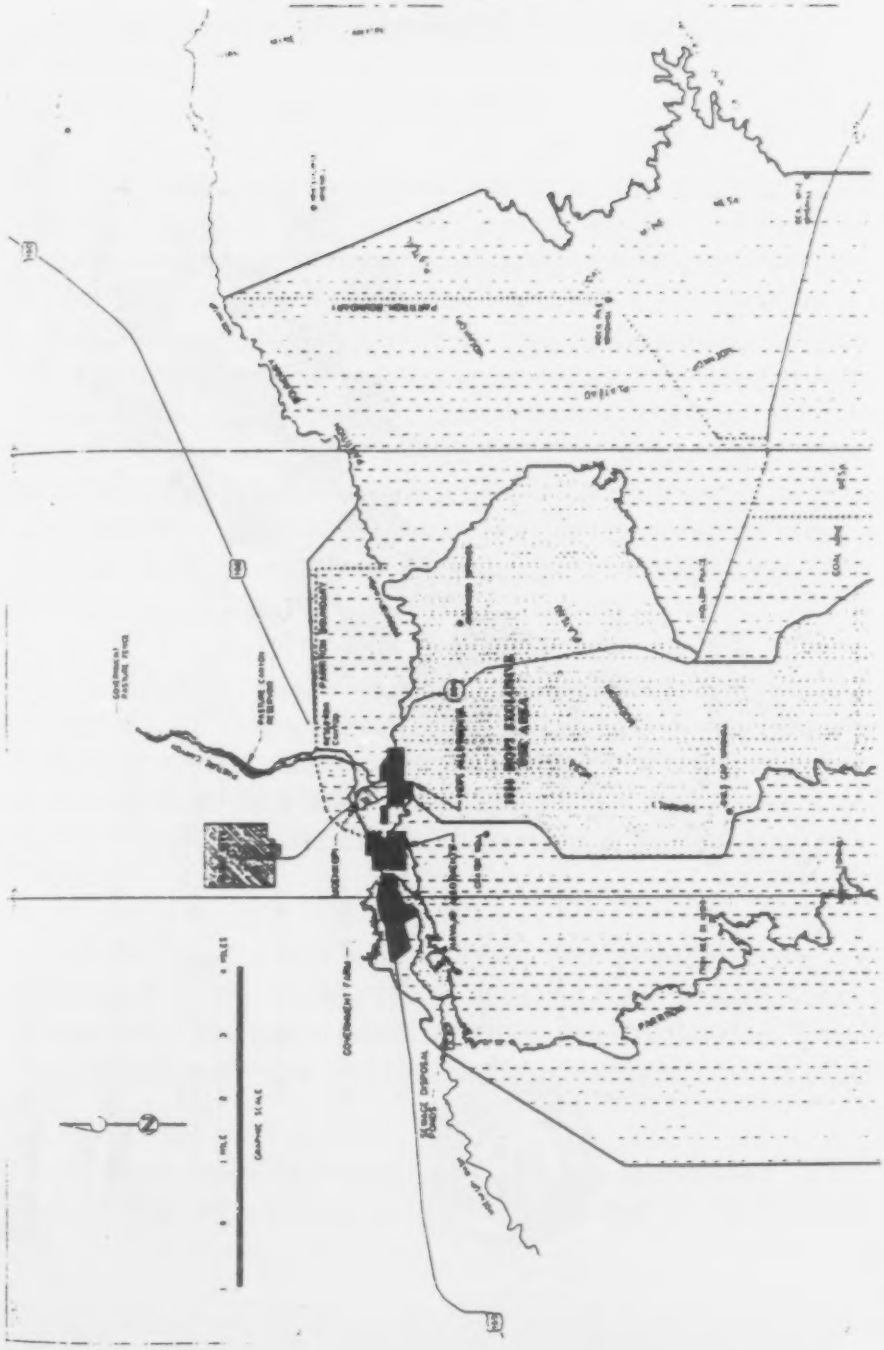
(13) That those Navajo families presently using Pasture Canyon Reservoir are granted a license and/or easement to water their livestock. This license and/or easement does not extend to grazing Navajo livestock within the section of Pasture Canyon partitioned to the Hopis, including at the sides of the Reservoir (except for that grazing impossible to prevent while watering animals). If the Hopi Tribe chooses to build a pipeline from the Reservoir to troughs on the eastern and western sides of the Reservoir (outside of the boundary), or some other measure which will ensure a continuous water supply for Navajo livestock, then the Hopi Tribe may petition this Court for termination of this license and/or easement.

(14) That the "Bennett Freeze" restriction on construction and development within the 1934 Reservation, and codified by 25 U.S.C. § 640d-9, is lifted.

IT IS FURTHER ORDERED that each of the parties shall, within 20 days from the date of this Order, pay to the Clerk of this Court the sum of $1,232.24, covering one-half the Court's cost for a computer generated acreage calculation and map of the lands partitioned by this Judgment.

Appendix C

APPENDIX A



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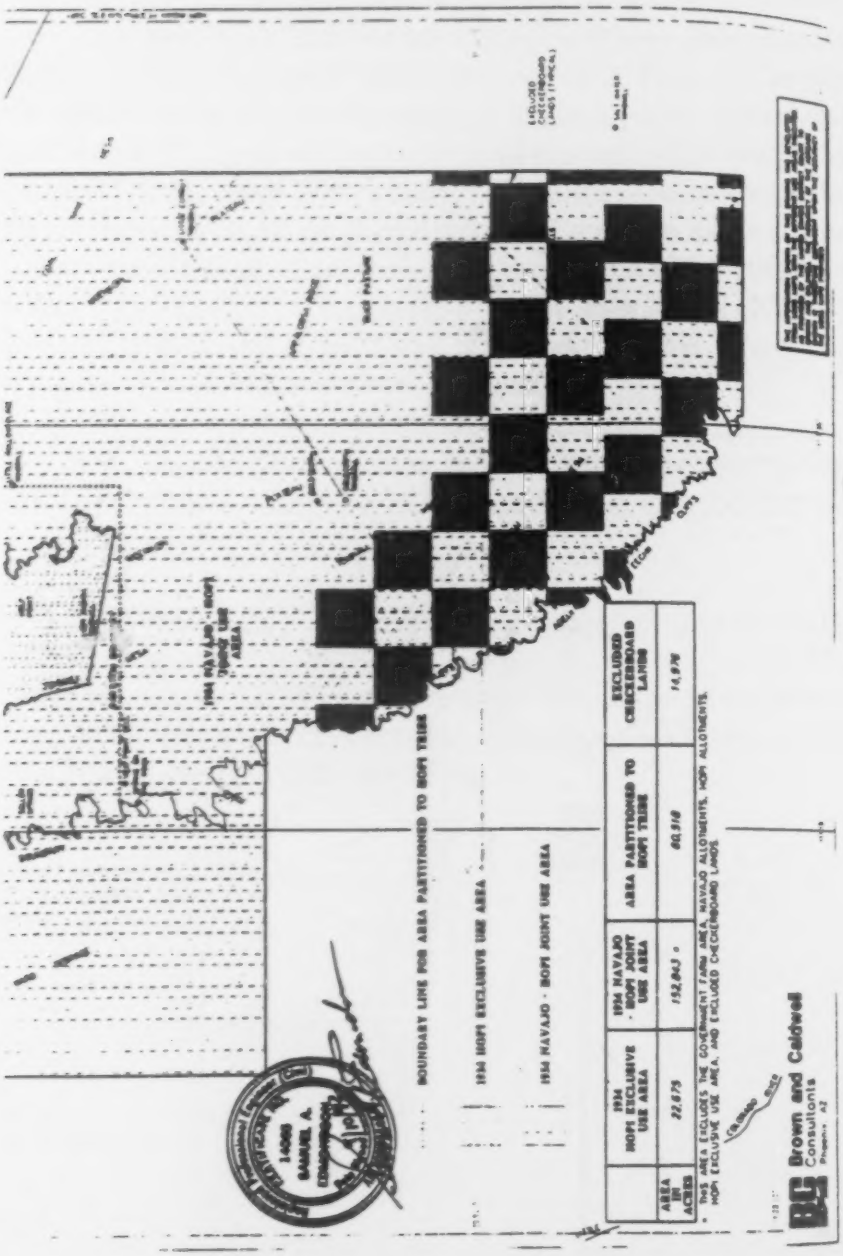
Appendix C

APPENDIX A — CONTINUED



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Appendix C

ORDER RE: HOPI TRIBE'S MOTION TO ALTER OR AMEND JUDGMENT

Dec. 21, 1992

The Hopi Tribe has filed a motion to alter or amend this Court's September 25, 1992 Judgment re: Partition of the 1934 Reservation. The Hopi Tribe requests that the judgment require the Navajo Nation to install a pipe from the Rock Pile windmill, immediately outside the boundary of the land partitioned to the Hopi Tribe, to troughs inside the boundary line. The Navajo Nation has no objection and this provision will be incorporated into the final judgment. The Hopi Tribe recounts evidence presented at trial which indicates that Hopis use the Rock Pile windmill for watering their livestock.[1] This Court's Findings of Fact are thus amended to reflect the use of Rock Pile windmill by Hopis.

In response to the Hopi Tribe's motion to alter or amend the Judgment, the Navajo Nation submitted a proposed form of judgment, and a memorandum in support which identifies ambiguities in the Findings and Judgment which may create future disputes when surveying the area partitioned to the Hopi Tribe.

First, the Navajo Nation states that this Court's map, attached to the September 25 Findings and Judgment, excludes a Hopi ranch and corral from land partitioned to the Hopi Tribe in Little Hollow Place. The Navajo Nation suggests moving the

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1. Wilfred Kaye testified that he and other Hopis use "Windmill No. 3", depicted on Ex. 4422, which refers to Rock Pile Windmill. TT 148-153, 167, 180.

partition line to a line 100 feet east of the easternmost Hopi structure; this proposal results in the partition of approximately 800 more acres to the Hopi Tribe. The Hopi Tribe concurs. This Court's intent was to include all Hopi structures within land partitioned to the Hopi Tribe, and the partition line will be moved to the east in Little Hollow Place, as reflected in the Navajo Nation's proposed judgment.

Second, the Navajo Nation states that the partition line on the Court's map, and the partition line as described in the Findings, are inconsistent in their treatment of the Goldtooth family's area south of Moenkopi Wash. The Court's map shows the partition line as following the upper edge of the Moenkopi Plateau, and running along the eastern border of the Hopi farms in the "Masaaw" area south of the Wash. In contrast, the Findings describe the partition line as following the base of the Plateau,[2] and running along the eastern edge of a bluff between the Goldtooth area and the Hopi farms, which excludes some of the Goldtooth structures in that area.

The Navajo proposed judgment proposes amending the Findings to follow the line on the map, which would include the cliffs below the Plateau in land partitioned to the Navajo Nation. The Navajos argue that the Goldtooth family has a corral near Goldtooth Spring above the base of the Plateau, *see* Site 45E on Ex. 5001, and there was no evidence that Hopis used the cliffwall overlooking the Goldtooth farms. Further, the Navajos argue

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2. The Navajo Nation also argues that the Findings describing the 1934 Hopi exclusive use area indicates a boundary along the upper edge of the Moenkopi Plateau, consistent with the Court's map. However, the definition of the 1934 Hopi exclusive use area does not control the location of the partition line, except to the extent that the Hopi exclusive use area must be included in the area partitioned to the Hopi Tribe.

that there was no evidence of Hopi use of the bluff between the Goldtooth structures and the Hopi farms, and partitioning this area to the Navajo Nation would provide privacy for the Goldtooth family's ceremonials held south of the Wash.

The Hopi Tribe advocates following the written Findings, in which the partition line follows the base of the Plateau, but proposes redrawing the partition line so that it runs 100 feet west of the westernmost Goldtooth structures, so as to include all Navajo structures in land partitioned to the Navajo Nation.

This Court will adopt each party's position, in part. The partition line will follow the 4700-foot contour line of the Moenkopi Plateau, near the top of the Plateau. The Navajo allotments immediately to the east of the Goldtooth area extend to the 4700-foot contour line, and an extension of this boundary enables the Goldtooth family to keep its corral and to utilize the spring on the cliffwall of the Plateau. Further, the partition line will travel from the top of the Plateau from a point immediately south of the point at which the partition line in the Court's written findings turned east, directly north to where it intersects with the unimproved dirt road just south of the wash. Attachment A to this Order depicts the partition line to be described in the final judgment; the partition line follows the red line until it intersects with the black line, which intersects with the unimproved road. (The red line follows the Court's map, the blue line follows the Court's written Findings, and the purple and white dashed line follows the Hopi Tribe's proposal.) The western boundary will provide privacy for the Goldtooth ceremonies, and provide a "buffer" between the Hopi farms and Navajo land.

Third, in its proposed judgment, the Navajo Nation proposes a more explicitly defined boundary for Pasture

Canyon. Because the "park" area south of Pasture Canyon Reservoir is not defined by steep walls, a more explicit partition line through this area would avoid dispute during the surveying process. Essentially, the Navajo Nation proposes following the tree line for the western and eastern boundaries below the Reservoir. The Navajo proposed judgment also defines a boundary for the Hopi land within Pasture Canyon.

The Hopis object to the Navajo Nation' proposed boundary. First, the proposed boundary is defined at the water line of the Hopi Reservoir, eliminating any possibility of expanding the size of the Reservoir. On reply, the Navajos agree that the boundary within the Canyon should be set at 200 feet on each side of the Reservoir's high-water mark, and this will be reflected in the Court's final description of the partition line.

The Hopi Tribe also objects that the Navajo proposed judgment too narrowly defines Hopi partitioned lands south of the Reservoir through the "park" area, and suggests alternative language to the Navajos' proposed judgment. The Navajo Nation objects that the Hopi proposed line passes too close to Navajo homes on each side of this area to that there was no evidence of Hopi use of this extra acreage. The Court will adopt an intermediate position. On the east side, the partition line will travel north along the unimproved dirt road, from Highway 160 until it reaches the intersection of a second unimproved dirt road (just northeast of the label "A" on Ex. 4176A). At that point, the partition line will travel north (where the first north-south unimproved road travels slightly northwest), 200 feet from that unimproved road, until the line reaches a point 200 feet east of the southern tip of Pasture Canyon Reservoir. The partition line will then follow 200 feet east of the eastern high-water mark of Pasture Canyon Reservoir, travel west along the old

"Government Pasture" fence, and follow 200 feet west along the western high-water mark of the Reservoir. At a point 200 feet west of the southern point of the Reservoir, the partition line will follow the tree line, as depicted on Attachment B.

Also, the Hopis request an amendment to the easement granted to the Hopi Tribe to maintain the irrigation ditches running through the Navajo farms in the upper part of Pasture Canyon, so that the Hopi Tribe will be allowed to "improve" the ditches, as well as maintain them. The Navajo Nation does not object to allowing the Hopi Tribe to install pipes or otherwise enclose the ditches, but object that an open-ended permission to "improve" the ditches may allow the Hopi Tribe to impound or capture the springs on which the Navajo farmers depend. The Court's amended easement will allow the Hopi Tribe to "improve" the irrigation ditches, as requested, but will specifically prohibit the Hopi Tribe from interfering with Navajo use of the springs in Pasture Canyon.

The Hopi Tribe points out that the Court's map is inconsistent with the written Findings on Coal Mine Mesa, around Site 57 belonging to Gee Flatrock. The Hopi Tribe is correct that the Court's intention was to place Navajo Site 57 just outside the boundary of the land partitioned to the Hopi Tribe.[3] The Court's map (and hence, the Navajo's proposed judgment), gives a margin of 2000 feet on the west and north of Site 57. The Hopi Tribe proposes that the boundary should be 100 feet within Site 57, similarly to the boundary provided around the Hopi structures in Little Hollow Place. The Court will adopt the Hopi

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3. The Court intended the boundary to proceed southeast along Highway 264 to a point "directly south of Site 57", and then turn north "passing immediately west of Site 57 to a point just north of Site 57." September 25, 1992 Findings. p. 57.

proposal as expressing the intent of the Court in its partition order; this change will give the Hopi Tribe approximately 640 more acres.

Finally, the San Juan Southern Paiute Tribe (Paiute Tribe) objects to the Navajo Nation's proposed judgment, to the extent that it did not provide for joint administration over the lands in which this Court held the Paiute Tribe had an interest. However, the Navajo Nation is correct that the declaration of the Paiute interest does not confer any jurisdiction on that Tribe over those lands. This Court has previously held that it does not have jurisdiction to partition land to the Paiute Tribe, nor to create a reservation for that Tribe. *See* March 123, 1992 Order at 13. Congress has defined the Paiutes' exclusive remedy as the allotment of parcels of land to Paiute individuals, which precludes the judicial creation of a different remedy. 25 U.S.C. 640d-8. *Id.* at 12.

Further, the Navajo Nation is correct that *Healing v. Jones,* 210 F.Supp. 125, 192 (D.Ariz.1962), did not provide that the joint use area was to be jointly administered by the Hopis and Navajos. Instead, the Court, held that because the Court lacked jurisdiction to partition the joint use area, "[i]t will not be for the two tribes and Government officials to determine whether . . . the area . . . can and should be fairly administered as a joint reservation."

Finally, the Settlement Act conditions that a tribe's civil and criminal jurisdiction over land partitioned to it, stating that "each tribe shall have such jurisdiction and authority over any lands partitioned to it and all persons located thereon . . . to the same extent as is applicable to those other portions of its reservation" 25 U.S.C. 640d-9(e)(1)(B). The latter clause, "to the same extent

as is applicable to those other portions of its reservation," also indicates that the exercise of jurisdiction is not available to the Paiute Tribe, because the Paiute Tribe does not have a reservation. The Navajos' proposed judgment will thus be adopted regarding the Paiute Tribe.

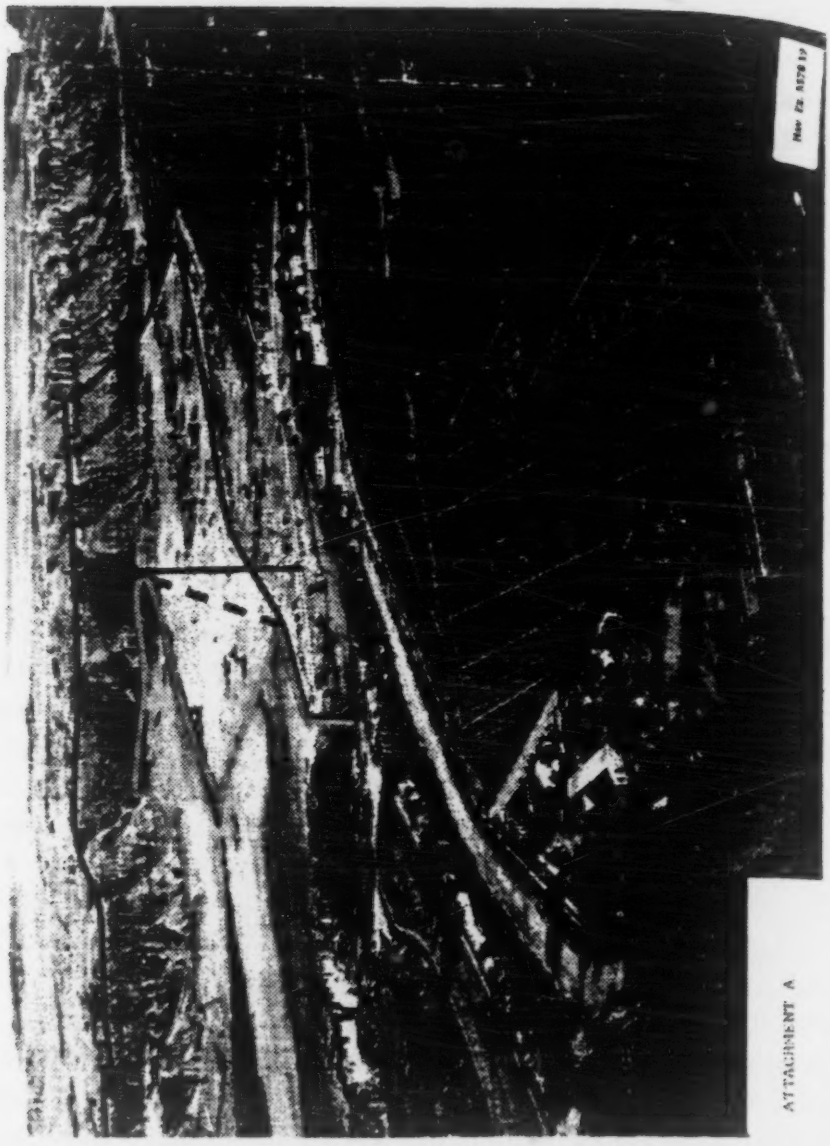
These conclusions, and those expressed in the Court's September 25 Findings of Fact and Conclusions of Law and Judgment, as amended by this order, will be set forth on a separate document, as required by Fed. R.Civ.P. 58.

Accordingly,

IT IS HEREBY ORDERED that the Court's Findings of Fact, Conclusions of Law and Judgment, dated September 25,1992 are amended, in accordance with this Order.

Appendix C

ATTACHMENT A



Appendix C

Appendix C

ATTACHMENT A

Beginning at a point common to the States of Arizona, New Mexico, Colorado, and Utah, thence west along the boundary line between the States of Arizona and Utah to a point where said boundary line intersects the Colorado River; thence down the south bank of that stream to its confluence with the Little Colorado River; thence following the north bank of the Little Colorado River to a point opposite the east boundary of the Grand Canyon National Park; thence south along said east boundary to the southeast corner of section 6, township 30 north, range 6 east, Gila and Salt River base and meridian, Arizona; thence east to the southeast corner of section 4; thence south to the southwest corner of section 10; thence east to the southeast corner of section 10; thence south to the southwest corner of section 14; thence east to the northwest corner of the northeast quarter section 23; thence south two miles to the southeast corner of the southwest quarter section 26; thence west one half mile to the southeast corner of section 27, township 30 north, range 6 east, Gila and Salt River base and meridian, Arizona; thence south seven miles to the southwest corner of section 35, township 29 north, range 6 east; thence east one mile; thence south one and one half miles to the southwest corner of the northwest quarter section 12, township 28 north, range 6 east; thence east through the center of section 12 to the range line between ranges 6 and 7 east; thence south along said range line five and one half miles to the southeast corner of section 1, township 27 north, range 6 east; thence west three miles to the southwest corner of section 3, township 27 north, range 6 east; thence south five miles to the southeast corner of section 33, township 27 north, range 6 east; thence east along township line between townships 26 and 27, six and one half miles, to the north-east corner of the northwest quarter section 8, township 26 north, range 7 east; thence south

two miles to the southeast corner of the southwest quarter section 10, township 26 north, range 7 east; thence east four and one half miles to the southeast corner of section 8, township 26 north, range 8 east; thence north four miles to the northwest corner of section 28, township 27 north, range 8 east, Gila and Salt River base and meridian; thence east one mile to the east corner of section 21; thence north four miles to the northeast corner of section 4, township 27 north, range 8 east, then 4, township 27 north, range 8 east, thence east along township line between townships 27 and 28 north to its intersection with the Little Colorado River; thence up the middle of that stream to the intersection of the present west boundary of the Leupp Extension Reservation created by Executive order of November 14, 1901; thence south along the present western boundary of said extension to where it intersects the fifth standard parallel north; thence east along said standard parallel to the southwest corner of township 21 north, range 26 east, Gila and Salt River base and meridian; thence north six miles to the northwest corner of township 21 north, range 26 east; thence east twelve miles to the northeast corner of township 21 north, range 27 east; thence south two miles; thence east twelve miles; thence south four miles; thence east along the township line between townships 20 and 21 north to the boundary line between the States of New Mexico and Arizona; thence north along said boundary line to the point of beginning.

however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882.

Appendix C

ATTACHMENT B

Hopi Partitioned Lands

The Hopi Partitioned Lands are situated in Township 30 North, Range 11 East; Township 30 North, Range 12 East; Township 31 North, Range 10 East; Township 31 North, Range 11 East; Township 31 North, Range 12 East; Township 32 North, Range 11 East; Township 32 North, Range 12 East, of the Gila & Salt River Base & Meridian, Coconino County, Arizona, within the boundary described as follows:

(a) Starting at a point of beginning at the middle of the streambed of the Moenkopi Wash at the sharp bend in that streambed (where it changes its direction of flow from southeasterly to westerly) situated in Section 1 of Township 31 North, Range 10 East, appropriately 1,500 feet east of the western boundary of said Section 1 then proceeding due south to the top of the northern rim of the Moenkopi Plateau at approximately 4,800 feet of elevation;

(b) then proceeding in a generally west-southwesterly section along the rim of Moenkopi Plateau at 100 feet of elevation to point due north of the point on the USGS 7.5-minute topographic map, Moenave SE quadrangle (1969) which is marked 'x4955' (said point being approximately 4950 feet south of the southwest corner of the Sewer Lagoon in Kerley Valley); then proceeding due south approximately 200 feet to a point on the rim of Moenkopi Plateau which is at 4900 feet of elevation; then proceeding in a generally southerly direction along the rim of Moenkopi Plateau along the rim of Moenkopi Plateau along the 4900-foot contour line, passing to the west of the developed springs at Toh Nee Di Kishi, Tohnali, and Seller Springs, to a

point on the rim of the plateau which is approximately 500 feet west and immediately north of View Point Well;

(c) then proceeding due east to a point directly south of the Hopi stone house in the Little Hollow Place (said house being approximately 1,500 feet east of the Little Hollow Place Windmill);

(d) then continuing due east a distance of another 100 feet;

(e) then proceeding from that point due north, passing 100 feet to the east of the Hopi stone house in Little Hollow Place, to the center of the right-of-way of Arizona Highway 264 (provided, however, that the partitioning fence to be built by the United States shall terminate where it meets the fence now existing along the southern edge of said right-of-way);

(f) then proceeding in an east-southeasterly direction along the centerline of Arizona Highway 264 until it intersects a north-south line which passes through a point 100 feet west of the westernmost structure now present at Navajo Site 57 (the location of which is identified on Navajo Exhibit 5001);

(g) then proceeding due north along said north-south line approximately 1900 feet to a point which is due west of the westernmost structure now present at Navajo Site 57; then proceeding due north an additional 100 feet;

(h) tben proceeding in a generally north-easterly direction to a point immediately west of Rock Pile Windmill;

(i) then proceeding due north to the middle of the stream bed of the Moenkopi Wash;

(j) then proceeding down the middle of the stream bed of the Moenkopi Wash in a generally westerly direction to the eastern boundary of Township 32 North Range 11 East;

(k) then proceeding due north along the eastern boundary of Township 32 North, Range 11 East approximately 5,700 feet to a point on a line running directly east from the intersection of the southern edge of the right-of-way of Arizona Highway 160 and the eastern edge of an unimproved road leading south to the eastern side of Reservoir Canyon, as shown on Nav. Ex. 4176A;

(l) then proceeding due west along said line to the aforementioned intersection;

(m) then proceeding in a generally northerly direction along the unimproved road leading north into Pasture Canyon, until that road reaches the intersection of a second unimproved dirt road (just north of the label "A" on Ex 4176A); then proceeding north (where the first unimproved road turns slightly northwest), parallel to, and 200 feet from the first unimproved road, until it reaches a point 200 feet east of the southern tip of Pasture Canyon Reservoir; then following a line which is parallel to, and 200 feet to the east of, the eastern high-water mark of the Reservoir to a point due east of the northernmost high-water mark of the Reservoir; then proceeding in a generally northerly direction along the eastern edge of Pasture Canyon, against the eastern wall of Pasture Canyon, until it reaches a fence demarcating the southern boundary of the former "Government Pasture" said fence being located approximately 100 feet south of the southern boundary of Section 10 of Township 32 N, Range 11 E;

(n) then in a generally westerly direction along the

aforementioned fence to the western edge of the floor of Pasture Canyon;

(o) then proceeding in a southerly direction along the western edge of the Canyon floor, against the west wall of the Canyon, to the southern edge of the cultivated Hopi fields; then proceeding south-southwest approximately 600 feet to a point which is 200 feet due west of the northernmost highwater mark of Pasture Canyon Reservoir; then proceeding in southerly direction along a line which is parallel to, and 200 feet to the west of, the western high-water mark of Pasture Canyon Reservoir, to a point 200 feet due west of the southern tip of the Pasture Canyon Reservoir;

(p) then proceeding in a generally southerly and southeasterly direction along the western edge of the tree-line on the western edge of Pasture Canyon, passing east of Navajo Sites 100 and 108 (as shown on Nav. Ex. 4176A), until it reaches the middle of the right-of-way of Arizona Highway 160 at a point where an unimproved road on the western side of Pasture Canyon intersects with Arizona Highway 160;

(q) then following the middle of the right-of-way of Arizona Highway 160 in a generally westerly, then generally southerly direction to the northern boundary of Navajo allotment Tract No. 37 (as shown on the Dependent Resurvey of Tracts in Section 32 T-32 North, R-11 East of the Gila & Salt River Base & Meridian, Coconino County, Arizona, Officially Filed March 18,1991, Utilizing Map 1 of 7 (1283-B), Map 6 of 7 (1283-G) & Map 7 of 7 (1283-H));

(r) then east along the northern boundary of Tract No. 37 to the tract's northeastern corner, then south along the eastern

boundary of Tract No. 37 to the tract's southeastern corner, then west along the southern boundary of Tract No. 37 until it reaches the tract's southwestern corner, then south along the eastern boundary of Navajo allotment Tract Nos. 39 and 42 (as shown on the Dependent Resurvey of Tracts in Section 32 T-32 North, R-11 East of the Gila & Salt River Base & Meridian, Coconino County, Arizona, Officially Filed March 18, 1991, Utilizing Map 1 of 7 (1283-B), Map 6 of 7 (1283-G) & Map 7 of 7 (1283-H)) until it reaches the southeastern corner of Tract No. 42;

(s) then proceeding in a westerly direction along the 4700-foot elevation near or at the top of the Moenkopi Plateau, until it is at a point on the Plateau immediately above a point adjacent to an unimproved dirt road which passes between the base of the Moenkopi Plateau and a bluff or hill lying to the north, in the vicinity of Navajo Site 24 (the location of which is shown on Exhibit 5002);

(t) the proceeding in a northerly direction across the hill or bluff until it intersects unimproved direct road just south of Moenkopi Wash; then proceeding along the midpoint of said unimproved dirt road, until the road reaches the middle of the stream bed of the Moenkopi Wash;

(u) then proceeding in a generally westerly direction along the middle of the stream bed of the Moenkopi Wash to the point of beginning.

AMENDED FINAL JUDGMENT

Dec. 21, 1992

This action having come on regularly for trial between

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October 17,1989 and February 8, 1990 and again between July 7 and July 21, 1992; plaintiff having appeared by and through his attorneys, Arnold & Porter, defendant having appeared by and through his attorneys, Brown & Bain, P.A., and intervenors having appeared by and through their attorneys, the Native American Rights Fund; the Court having fully considered all the evidence and the entire record herein; and the Court having made its findings of fact and conclusions of law and orders as set forth in its opinions dated April 27, 1992 (Findings of Fact and Conclusions of Law re: Hopi Claims), March 13,1992 (regarding limitations on the Court's jurisdiction to partition land to the San Juan Southern Paiute Tribe), June 18,1992 (Order Amending Findings of Fact re: Hopi Claims), July 10,1992 (Findings of Fact and Conclusions of Law re: San Juan Southern Paiute Claims), September 25, 1992 (Findings of Fact and Conclusions of Law and Judgment re: Partition of the 1934 Reservation), and the other orders referenced therein; and the Court having determined that the parties are entitled to judgment (amended) as set forth herein, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

A. *Defining the Lands in Issue.*

For purposes of this Final Judgment, the term "The 1934 Reservation" shall mean all the lands within the boundaries described in Attachment A, being the legal description appearing in the Act of June 14, 1934, 48 Stat. 960.

B. *Quieting Title to that Portion of The 1934 Reservation Partitioned to The Hopi Tribe.*

1. Subject only to the trust title of the United States of America, title to the lands described in Attachment B

(hereinafter "the Hopi Partitioned Lands") is hereby quieted forever in favor of the Hopi Tribe and against the Navajo Nation and all Navajo villages, clans and individuals and it is hereby declared that neither the Navajo Nation nor any Navajo village, clan or individual has or shall have any estate, right, title, lien, or interest whatever in or to the Hopi Partitioned Lands or any part thereof, and that the Hopi Tribe owns, and is entitled to possession of, the Hopi Partitioned Lands, both surface and subsurface interests, subject to the trust title of the United States, and the Navajo Nation and all persons claiming under it and its villages, clans, and individual members are hereby permanently enjoined from asserting any estate, right, title, lien, or interest in or to the Hopi Partitioned Lands.

2. Subject only to the trust title of the United States of America, title to the Hopi Partitioned Lands is hereby quieted forever in favor of the Hopi Tribe and against the San Juan Southern Paiute Tribe and its individual members and it is hereby declared that neither the San Juan Southern Paiute Tribe nor its individual members have or hall have any estate, right, title, lien, or interest whatever in or to the Hopi Partitioned Lands or any part thereof, and that the Hopi Tribe owns, and is entitled to possession of, the Hopi Partitioned Lands both surface and subsurface interests, subject to the trust title of the United States, and the San Juan Southern Paiute Tribe and all persons claiming under it and its individual members are hereby permanently enjoined from asserting any estate, right, title, lien, or interest in or to the Hopi Partitioned Lands.

3. The Hopi Partitioned Lands shall henceforth be subject to the jurisdiction of the Hopi Tribe to the same extent as is applicable to other portions of its reservation.

Appendix C

C. *Declaration of the Interests of the San Juan Southern Paiute Tribe in a Portion of The 1934 Reservation.*

1. For the reasons stated in this Court's order of March 13, 1992 (regarding this Court's jurisdiction over claims brought by the San Juan Southern Paiute Tribe), as supplemented by this Court's opinion dated July 10, 1992 (Findings of Fact and Conclusions of Law re: San Juan Southern Paiute Claims), the San Juan Southern Paiute Tribe is not entitled to a partitioning of any lands in this action and the jurisdiction and authority of this Court are limited to declaring the lands in which the San Juan Southern Paiute Tribe has an interest.

2. The San Juan Southern Paiute Tribe has a property interest in that portion of The 1934 Reservation described and set forth in this Court's opinion of July 10, 1992 (Findings of Fact and Conclusions of Law re: San Juan Southern Paiute Claims), the location of which is generally shown on the maps attached to this judgment as Attachment C. Said lands shall hereinafter be referred to as "the Paiute Lands," although the Navajo Nation also has a property interest in a part of the Paiute Lands, as set forth in the said prior opinion.

3. The Hopi Tribe does not have any interest in any portion of the Paiute Lands.

4. Because this Court lacks jurisdiction to partition land to the San Juan Southern Paiute Tribe, this Court's declaration of the San Juan Southern Paiute Tribe's property interest in the Paiute Lands does not confer any jurisdiction to that tribe over any part of those lands.

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D. *Quieting Title to the Portion of The 1934 Reservation in Which Neither the Hopi Tribe nor the San Juan Southern Paiute Tribe Has Any Interest.*

1. Subject only to the trust title of the United States of America, title to all of The 1934 Reservation, excepting only the Hopi Partitioned Lands and the Paiute Lands, is hereby quieted forever in favor of the Navajo Nation and against the Hopi Tribe and all Hopi villages, clans and individuals and it is hereby declared that neither the Hopi Tribe nor any Hopi village, clan or individual has or shall have any estate, right, title, lien, or interest whatever in or to such lands or any part thereof, and that the Navajo Nation owns, and is entitled to possession of, such lands, both surface and subsurface interests, subject to the trust title of the United States, and the Hopi Tribe and all persons claiming under it and its villages, clans, and individual members are hereby permanently enjoined from asserting any estate, right, title, lien, or interest in or to such lands.

2. Subject only to the trust title of the United States of America, title to all of The 1934 Reservation, excepting only the Hopi Partitioned Lands and the Paiute Lands, is hereby quieted forever in favor of the Navajo Nation and against the San Juan Southern Paiute Tribe and its individual members and it is hereby declared that neither the San Juan Southern Paiute Tribe nor any of its individual members have or shall have any estate, right, title, lien, or interest whatever in or to such lands or any part thereof, and that the Navajo Nation owns, and is entitled to possession of, such lands, both surface and subsurface interests, subject to the trust title of the United States, and the San Juan Southern Paiute Tribe and all persons claiming under it and its individual members are hereby permanently enjoined from asserting any estate, right, title, lien, or interest in or to such lands.

3. All of The 1934 Reservation, excepting only the Hopi Partitioned Lands, is and shall be subject to the jurisdiction of the Navajo Nation to the same extent as is applicable to other portions of its reservation.

E. *Allotments Not Affected.*

This Judgment does not affect the title, possession, and enjoyment of lands heretofore allotted to Hopi and Navajo individuals for which patents have been issued. All Hopi allotments are located on land partitioned to the Hopi Tribe, and those allotments shall be subject to the jurisdiction of the Hopi Tribe. All Navajo allotments are located on land partitioned to the Navajo Nation, and those allotments shall be subject to the jurisdiction of the Navajo Nation.

F. *Implementing the Partitioning.*

1. 25 U.S.C. § 640d-18(b) and 18(c) requires the Secretary of the Interior to provide for the survey, location of monuments, and fencing of boundaries of the Hopi Partitioned Lands and to do so within twelve months of the final order of partition herein. For purposes of that requirement and all other provisions in this judgment that refer to the "final order of partition" or the like, entry of this judgment shall be deemed to be the final order of partition; *Provided, however,* that if any party files a notice of appeal, then the date of the final order of partition shall be deemed to be the date a mandate is issued by the Court of Appeals. The Court hereby retains jurisdiction of this action to resolve any issue that may arise relating to such survey; *Provided, however,* that the parties shall first attempt to resolve any such issue by agreement and if agreement cannot be reached and the Court is required to resolve such issue, the Court shall

assess attorneys' fees, court costs and incremental surveyors' expenses against the non-prevailing party. Upon completion of such survey, the parties shall cause to be expeditiously filed with the Court a certified copy of the survey findings and determination.

2. Within 90 days of the final order of partition, the Hopi Tribe shall install a trough outside the Hopi Partitioned Lands and a pipe from the Little Hollow Place Windmill, which shall deliver and contain sufficient water to provide for the livestock be longing to Navajo stockmen in the area, up to a maximum of one half of the water produced by Little Hollow Place Windmill. The pipe and trough shall thereafter be maintained by the Navajo Nation.

3. Within 90 days of the final order of partition, the Navajo Nation shall install a trough inside the Hopi Partitioned Lands and a pipe from the Rock Pile Windmill, which shall deliver and contain sufficient water to provide for the livestock belonging to Hopi stockmen in the area, up to a maximum of one half of the water produced by Rock Pile Windmill. The pipe and trough shall thereafter be maintained by the Hopi Tribe.

4. The public is granted a license and easement to utilize the portion of the Hopi Partitioned Lands lying south of Pasture Canyon Reservoir dam for recreational purposes. If this area ceases to be used as a Park, the Hopi Tribe may petition this Court termination of this license and easement after public notice and healing and this Court retains jurisdiction to hear any such petition.

5. The Hopi Tribe is granted a license and easement to improve or maintain the ditch running across the Navajo farms

in the northern part of Pasture Canyon, which access shall occur only after 10 days' advance written notice to the Navajo Nation and to the individual Navajos farming in Pasture Canyon. This license and easement does not allow the Hopi Tribe to interfere with Navajo use of the springs in Pasture Canyon.

6. The Navajos farming in Pasture Canon shall prevent their stock from destroying or damaging the irrigation ditches running through the upper part of Pasture Canyon and this Court retains jurisdiction to consider any injunctive relief and/or damage claims against the Navajo Nation respecting disturbance or damage to the irrigation ditches by Navajo individuals or their livestock.

7. Those Navajo families presently using Pasture Canyon Reservoir are granted a license and easement to water their livestock. This license and easement does not authorize grazing of Navajo livestock within the section of Pasture Canyon partitioned to the Hopis, including at the sides of the Reservoir, excepting for that grazing impossible to prevent while watering such animals. If the Hopi Tribe chooses to build a pipeline from the Reservoir to troughs on the eastern and western sides of the Reservoir (outside of the boundary of the Hopi Partitioned Lands), or some other measure which will ensure a continuous water supply for such Navajo live-stock, then the Hopi Tribe may petition this Court for termination of this license and easement and this Court retains jurisdiction to hear any such petition.

G. *Declaring Certain Restrictions on Development to be Ended.*

The restrictions on development on a portion of the 1934 Reservation, as codified by 25 U.S C. § 640d-9, are deemed

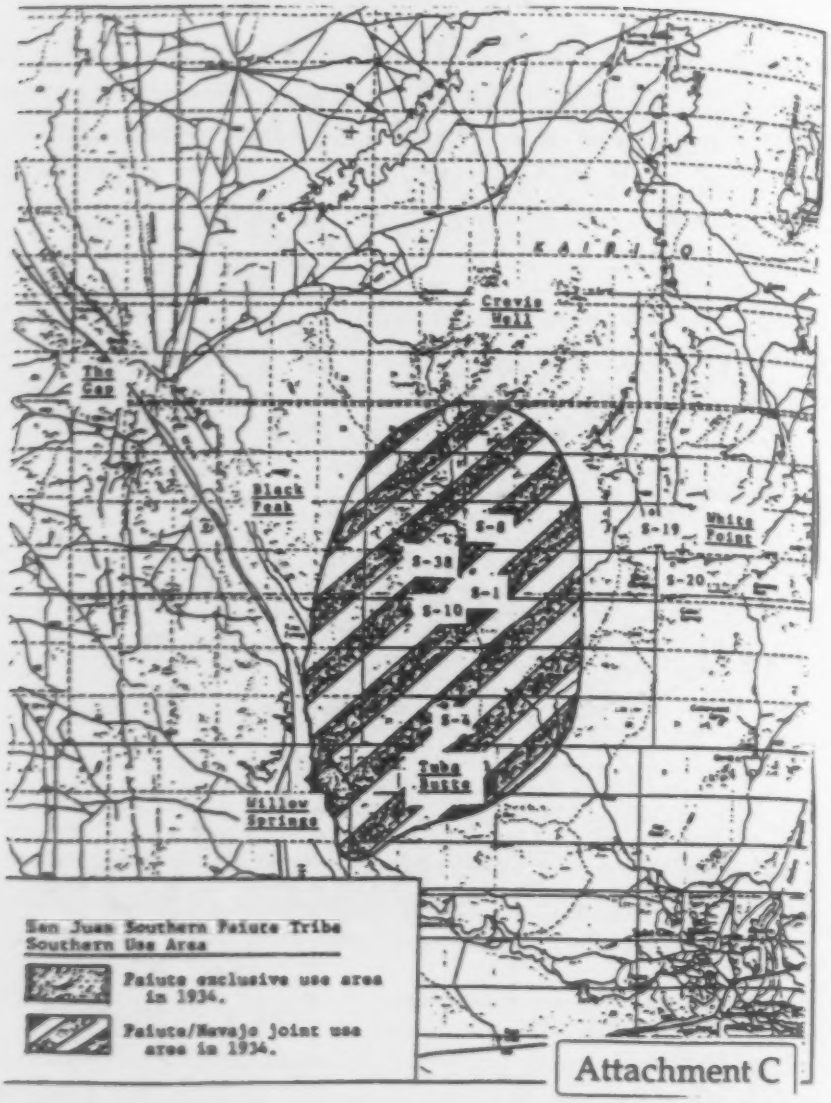
ended, except as provided in this Court's order granting, in part, the Hopi Tribe's motion for partial stay of the judgment.

IT IS FURTHER ORDERED that each party shall bear its own costs and attorneys' fees incurred to date in connection with this action.

IT IS FURTHER ORDERED the Court having disposed of all claims asserted herein against or by all parties, this Judgment is final.

Appendix C

ATTACHMENT C



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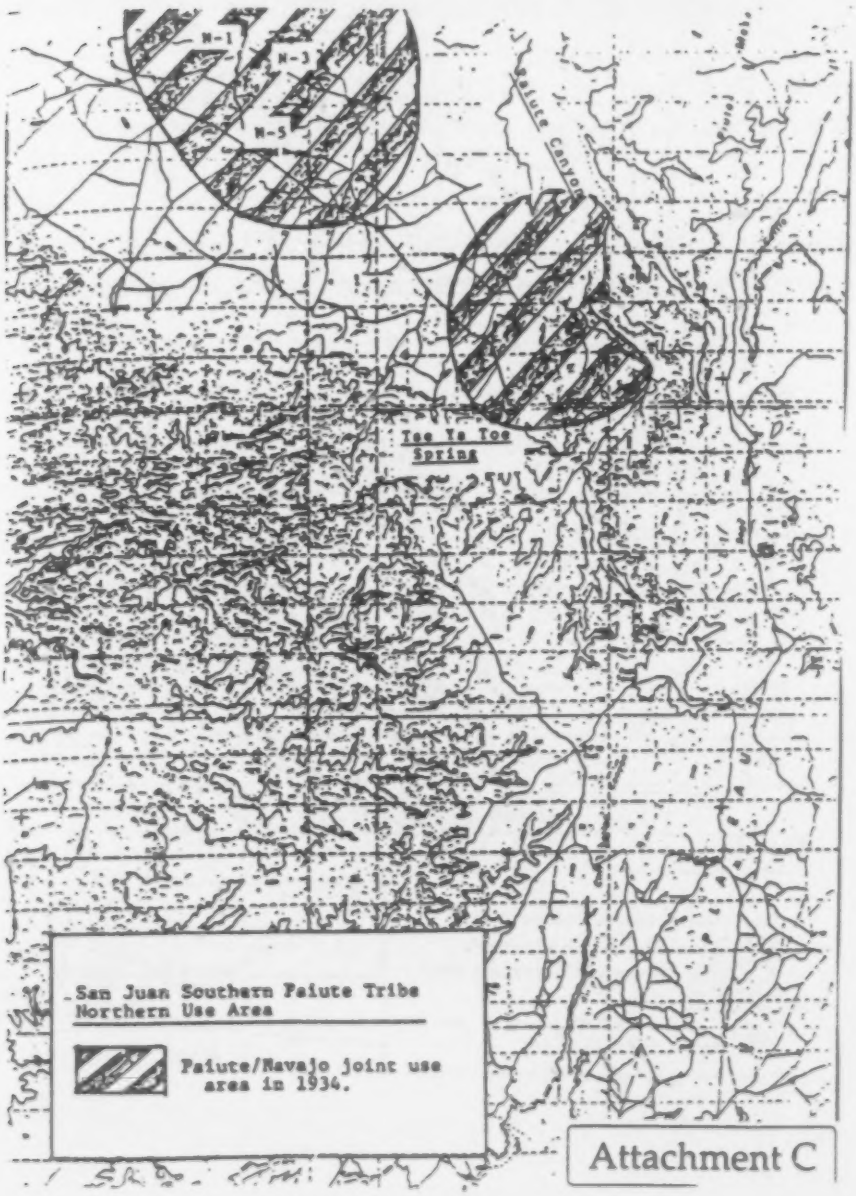
Appendix C

ATTACHMENT C — CONTINUED



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APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT DATED MAY 23, 1980

Abbott SEKAQUAPTEWA, Chairman of the Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and individual members of the Hopi Tribe, Appellant-Cross-Appellee,

v.

Peter MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and individual members of the Navajo Tribe, Appellee-Cross-Appellant.

Nos. 78-3504, 78-3505.

United States Court of Appeals,
Ninth Circuit.

May 23, 1980

* * *

George J. Romney, Salt Lake City, Utah (argued), John S. Boyden, Scott C. Pugsley, Boyden, Kennedy, Romney & Howard, Salt Lake City, Utah, on brief, for appellant cross-appellee.

Terry E. Fenzl, Richard Schifter, Fried, Frank, Harris, Shriver & Kampelman, Washington, D. C., for appellee-cross-appellant; Brown & Bain, Phoenix, Ariz., on brief.

Appendix D

Appeal from the United States District Court for the District of Arizona.

Before ANDERSON and SKOPIL, Circuit Judges, and BONSAL,* District Judge.

SKOPIL, Circuit Judge:

These are interlocutory cross-appeals from a partial summary judgment in a quiet title action. The action was brought to determine the respective property interests of the Navajo and Hopi tribes in the reservation withdrawn by the act of June 14, 1934, 48 Stat. 960 (hereafter "the 1934 Act"). We are also asked to decide whether the district court had jurisdiction over the Hopi claim for an accounting for all Navajo activities on land in which the Hopi Tribe has an interest. We affirm in part and reverse in part.

The Hopis have inhabited the area in controversy "[a]s far back as the Middle Ages." *Healing v. Jones,* 210 F.Supp. 125, 134 (D.Ariz.1962), *aff'd*, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963). The Navajos probably entered the area in the last half of the eighteenth century. *Id.* By treaty in 1868 the United States granted the Navajos an extensive reservation in the northeast corner of Arizona. 15 Stat. 667. The reservation was gradually expanded by a series of executive orders beginning in 1880 and continuing to 1918. An 1882 executive order withdrew a reservation (hereafter "the 1882 reservation") for the Hopis "and such other Indians as the Secretary of the Interior may see fit to settle thereon". Title to this reservation, on which the Navajos

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* The Honorable DUDLEY B. BONSAL, Senior United States District Judge for the Southern District of New York, sitting by designation.

and Hopis are intermingled, has been extensively litigated in a separate line of cases.[1]

Neither the 1868 treaty reservation nor the 1882 reservation is at issue here. The lands at issue are those withdrawn by other executive orders from 1880 to 1918. These lands became known as the Navajo reservation. Hereafter we refer to this area as "the Reservation". They surround the 1882 executive order reservation.[2]

A 1934 Act of Congress, 48 Stat. 960, defined the exterior boundaries of the Reservation. The Act provided, *inter alia*:

> All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of

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1. *See Healing v. Jones*, 174 F.Supp. 211 (D.Ariz.1959); *Healing v. Jones, supra*, 210 F.Supp, 125; *Hamilton v. Nakai*, 453 F.2d 152 (9th Cir. 1972), *cert. denied* 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332 (1972); *Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974); *Sekaquaptewa v. MacDonald*, 544 F.2d 396 (9th Cir. 1976); *Sekaquaptewa v. MacDonald*, 575 F.2d 239 (9th Cir. 1978).

2. This land was involved in *Sekaquaptewa v. MacDonald*, 591 F.2d 1289 (9th Cir. 1979).

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the Moqui (Hopi) Indian Reservation created
by Executive order of December 16, 1882.

In 1974 Congress authorized both tribes to sue "for the purpose of determining the rights and interests of the tribes in and to [the lands covered by the 1934 Act] and quieting title thereto in the tribes". 25 U.S.C. § 640d-7 (hereafter "the 1974 jurisdictional act").

I — PROCEEDINGS BELOW

The Hopis filed this action. Their amended complaint requests: (1) a declaration that the Hopis have an undivided one-half interest in the lands at issue; (2) that jointly held lands be partitioned; and (3) that the court order an accounting for all Navajo activities on all land in which the Hopis have an interest.

The district court limited the proceedings to a determination of the nature of the title conferred in the 1934 Act. Following discovery the parties filed cross motions for summary judgment. In a thorough opinion the district court held that it had jurisdiction of the first two claims but not of the accounting claim. It declared that the Hopi Tribe has an undivided one-half interest in all land it "possessed, occupied or used" in 1934. It declared further that the Navajo Tribe has (1) an undivided one-half interest in all reservation land "possessed, occupied or used" by the Hopis in 1934; and (2) exclusive trust title to the rest of the reservation. The district court took no action on the claim for partition, pending final resolution of title. It also did not identify specific lands "possessed, occupied or used" by the Hopis in 1934. We granted leave to appeal under 28 U.S.C. § 1292(b).

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II—DISCUSSION

We must first address the broad question of what rights were conferred by the 1934 Act. Two subordinate issues must be settled to resolve the broader question:

(1) What parts of the Reservation were "vacant, unreserved, and unappropriated Public lands, including all temporary withdrawals of public lands in Arizona heretofore made by executive order"?

(2) What property interests are conferred by the phrase "for the benefit of the Navajo and such other Indians as may already be located thereon"?

Next, we must determine whether the 1974 jurisdictional act confers jurisdiction of the Hopi Tribe's claim for accounting.

A. *What Rights are Conferred by the 1934 Act?*

1. What lands are included in the phrase, "all vacant unreserved, and unappropriated . . . lands, including all temporary withdrawals?" Does the 1934 Act apply to all prior executive order withdrawals or only some of them?

The Navajos contend first that "including" means that "temporary withdrawals" are a subclass (or example) of "vacant, unreserved, and unappropriated" lands. The district court held that "including" meant "and". In the district court's view the 1934 Act withdrew: (a) vacant . . . lands, *and* (b) temporary withdrawals.

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We agree with the district court. The primary purpose of the 1934 Act was to consolidate land ownership within the boundaries of the Reservation. Prior to 1934 neither tribe had recognized (compensable) title to areas withdrawn by executive order. To effectuate consolidated land ownership, the 1934 Act should be read to confirm land title to the greatest possible amount of land. The district court's conclusion is consistent with this.

The Navajos' suggestion that title was conferred only to "vacant" lands would have anomalous results. The district court's holding makes Hopi title hinge on possession, occupancy, or use. Hopi possession would preclude a finding of vacancy. The Hopis would have no title. Navajo title would be limited to lands vacant in 1934. We therefore reject this suggestion.

The Hopis contended that "temporary withdrawals" include all executive order withdrawals except the 1882 reservation exempted by the 1934 Act. The district court agreed, equating "temporary withdrawals" with executive order withdrawals. Its conclusion was based on the 1934 Act's purpose to consolidate reservation land ownership. It was necessary to confirm title in all executive order withdrawals since such withdrawals in themselves confer no recognized or compensable title. *See U. S. v. So. Pac. Transp. Co.*, 543 F.2d 676 (9th Cir. 1976).

The Navajos argue that "temporary" has acquired special meaning in United States Attorney General and Interior Department opinions which were based on dicta in a Supreme Court case, *U. S. v. Midwest Oil*, 236 U.S. 459, 35 S.Ct. 309, 59 L.Ed. 673 (1914). In the Navajos' view, executive order withdrawals made to preserve a *status quo* until Congress can act

are "temporary", and executive order withdrawals made for public purposes where no legislative action is contemplated are "permanent".[3]

The district court rejected this suggestion firmly. Its reasoning is persuasive. The overriding purpose of the 1934 Act repudiates the Navajos' interpretation. To consolidate reservation ownership it was necessary to change the status of reservation land title from a "tenancy at will to a permanent compensable interest". The proposed distinctions were developed by agency officials to justify executive withdrawals that would otherwise have conflicted with legislation. There is no reason to think that Congress approved this device or adopted this usage. If Congress had intended such a technical usage it might have said so clearly.

Finally, it is argued that "temporary withdrawals" must be construed not to apply to withdrawals made expressly for Navajos. The Navajos maintain that once lands are reserved for Indians, any subsequent grant purporting to affect those lands must be strictly construed. *Leavenworth, etc., R.R. Co. v. U. S.*, 92 U.S. 733, 746, 23 L.Ed. 634 (1876); *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962). The cited cases all involved assertions that Congress had withdrawn land from Indian reservation status, hence its status as "Indian country". See 18 U.S.C. § 1151. Among other things such a result would have terminated federal and tribal

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3. This distinction was approved by this court in *U. S. v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432, 445 (9th Cir. 1971), but in reference to an executive order withdrawal. That case sheds no light on whether such a usage should be attributed to Congress, which is the question here.

jurisdiction, both civil and criminal. 18 U.S.C. § 1151; *DeCoteau v. District County Court,* 420 U.S. 425, 427 n.2, 95 S.Ct. 1082, 1084 n.2, 43 L.Ed.2d 300 (1975). In view of these drastic results, a congressional intention to terminate is not to be inferred unless it is "expressed on the face of the Act or . . . clear from the surrounding circumstances and legislative history." *Mattz v. Arnett, supra,* 412 U.S. at 505, 93 S.Ct. at 2258.

No intent to terminate need be shown here because there has been no termination. No one contends that the 1934 Act withdrew the Reservation from Indian country. The federal government's jurisdiction and trust obligations remain intact. *See, e. g,* 25 U.S.C. § 631 *et seq.* Far from terminating prior executive order reservations, the 1934 Act reinforces them by recognizing and confirming Indian title.

Assuming an executive order could create an exclusive right of occupancy in one tribe versus another, it is important "to have in mind the circumstances in which the reservation was created". *Alaska Pacific Fisheries v. U. S.,* 248 U.S. 78, 87, 39 S.Ct. 40, 41, 63 L.Ed. 138 (1918). *See also U. S. v. Walker River Irr. Dist.,* 104 F.2d 334, 336 (9th Cir. 1939). Where two tribes have intermingled in the pattern shown here, we cannot blandly assume the executive has divested the indigenous tribe. The Navajos do not convincingly show that such was the executive's intent.

The Navajos next contend that the 1900 executive order withdrawal was ratified by a 1902 appropriations act, thereby recognizing Navajo title. A strict standard applies in determining whether legislation transfers or recognizes compensable title. *Tee-Hit-Ton Indians v. U. S.,* 348 U.S. 272, 278-79, 75 S.Ct. 313, 317, 99 L.Ed. 314 (1955) ("[T]here must be the definite intention

by congressional action or authority to accord legal rights, not merely permissive occupation"); *Hynes v. Grines Packing Co.*, 337 U.S. 86, 105, 69 S.Ct. 968, 980, 93 L.Ed. 1231 (1949) ("It would take specific and unambiguous legislation to cause us to rule that Congress intended to authorize the Secretary of the Interior to alienate fisheries permanently").

The 1902 appropriations act makes no direct or indirect mention of title. The Navajos do not point to convincing legislative history to support their position.[4] We reject the Navajo argument. *See Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655-56, 96 S.Ct. 1793, 1796-97, 48 L.Ed.2d 274 (1976).

We conclude that the 1934 Act applies to all prior executive order withdrawals.

2. What property interests are conferred by the phrase "for the benefit of the Navajo and such other Indians as may already be located thereon"?

The Hopis contend that this provision vests undivided, one-half interests in both tribes. In their view, "as may already be located thereon" is merely a way of identifying the Hopis. It does not limit Hopi rights to land occupied. In real estate conveyancing parlance, they are "words of purchase".

The district court held that this language limits Hopi rights

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4. The Navajo position is based on evidence that President McKinley felt that it would be unjust to take the 1900 executive order lands without compensation. This says little of legislative intent to recognize exclusive Navajo title.

to lands "possessed, occupied or used" in 1934. The words "as may already be located thereon" are words of limitation. Under the district court's holding, the Navajos have: (1) an undivided one-half interest in lands occupied by the Hopis in 1934, and (2) exclusive trust title in all other reservation lands.

The 1934 Act is concerned primarily with Navajo affairs. The boundaries described are of "the Navajo Indian Reservation". The Act provides for the purchase of additional Navajo lands with Navajo funds. Navajos are precluded from receiving royalties from water developments on lands added to the Navajo reservation. Further allotments to Navajos are restricted. The Secretary is authorized to acquire private land for the Navajos. The State of Arizona is authorized to exchange school sections "within the boundary of the Navajo Reservation . . . in favor of said Indians". Funds are authorized to purchase the State's improvements on school sections if the State assigns its interest in the sections to the Navajos.

The only mention of the Hopis in the 1934 Act is in the provision excepting the 1882 reservation from the Act's effects. The Hopis' argument that the "plain meaning" of the 1934 Act vests equal title in both tribes is tenuous at best. They stress the word "all" in "All . . . lands . . are . . . withdrawn . . . for the benefit of the Navajo and such other Indians as may already be located thereon." However, one must resort to extrinsic sources even to conclude that "such other Indians" includes the Hopis. The word "all" could be read to create undivided one-half interests in both tribes, but it does not do so unambiguously. Legislative history makes it plain that "located thereon" cannot be read to convey to the Hopis a one-half interest in the Reservation. The district court's holding was based on a fair reading of the 1934 Act's legislative history. See 448 F.Supp. 1193-1196.

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The Hopis suggest that real property conveyancing presumptions require that this language be construed to create a tenancy in common. Policies underlying conveyancing presumptions have no necessary application to federal-Indian relations.[5] The intent of Congress, which we read to conflict with the conveyancing presumptions, governs. We therefore reject this suggestion.

The Hopis also suggest this result is inconsistent with *Healing v. Jones, supra*, 210 F.Supp. 125. In *Healing* a 1958 statute withdrew the lands described in the 1882 executive order. The 1958 statute with drew lands "for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order". The 1882 executive order used similar words: "for the use and occupancy of the Moqui (Hopi), and such other Indians as the Secretary of the Interior may see fit to settle thereon." The *Healing* court held that the 1882 order created a Hopi right of occupancy to the entire area, regardless of where they settled. The Navajos subsequently acquired an equal right to occupy lands on which they were administratively settled. In areas where there was no Navajo settlement, the 1958 Act confirmed exclusive Hopi trust title.

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5. In *U. S. v. Washington*, 520 F.2d 676, 685 (9th Cir.) *cert. denied*, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976), *aff'g.* 384 F.Supp. 312 (W.D.Wash.1974), this court drew by analogy on cotenancy principles to adjust competing Indian and non-Indian claims to fisheries. However, this was only after the rights to the fisheries were determined pursuant to principles of treaty interpretation. The cotenancy analogy was used in aid of partition, after trial was determined.

If we were to apply real property principles to this case, the more accurate analogy might be to a class gift. *See Restatement of Property*, § 300 (and see Comment f), and § 367, Comment e (1940 ed.).

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The Hopis contend that the district court's ruling here is in effect the same as the ruling in *Healing:* the named tribe receives an interest in all lands, while the "other Indians" have a one-half interest in land occupied. Yet the statute and order in Healing are different from the 1934 Act at issue here. In *Healing* "other Indians' " rights were contingent on administrative action. In this case no such action was required. The 1934 Act immediately vested rights in both tribes. Therefore, the Hopis argue, equivalent results in the two cases must be error.

Even if the district court's holding were inconsistent with *Healing*, legislative intent behind the 1934 Act must control. But there is no inconsistency. The statute and order in *Healing* used different language in a different legislative setting than the 1934 Act. The fact that the two cases arrived at superficially similar results should not in itself give pause. The single factor present in *Healing* and not here was the initial withdrawal of all land in favor of the named tribe. In Healing the "other Indians" obtained an interest in reservation lands only after obtaining secretarial authorization to settle. The Hopis seem to suggest that this *Healing* method is the only way for Congress to authorize the result the district court reached. Congressional power over Indian land is broad. *Warren Trading Post v. State Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965); *U. S. v. Sandoval*, 231 U.S. 28, 34 S.Ct. 1, 58 L.Ed. 107 (1913). We cannot restrict Congress in the way the Hopis suggest. Congressional intent is inconsistent with the Hopis' claim to entitlement to a one-half interest in the reservation. We must respect that intent.

Finally, the Hopis argue that the issue of title is a political question. Congress did not identify Navajo-Hopi boundaries in the 1934 Act. The Hopis would not agree to boundaries proposed

by the administration, and Congress was unwilling to force the issue. The Hopis lobbied to protect what they thought was theirs. This resulted in the exemption of the 1882 reservation from the 1934 Act and the "such other Indians" language. The question is what inferences can be drawn from this. The Hopis suggest that: (1) since Congress refused to draw a Navajo-Hopi boundary, it is improper (as a political judgment) for the court to impose limitations on Hopi property interests; and therefore (2) the 1934 Act must be read as creating a cotenancy. The Navajos suggest that Congress specifically limited Hopi rights by the "such other Indians as may already be located thereon" provision.

Whether the title question is political depends on whether there is "a lack of judicially discoverable and manageable standards for resolving it"; or whether the question is impossible to decide "without an initial policy determination of a kind clearly for nonjudicial discretion". *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962). *See also Healing v. Jones, supra*, 174 F.Supp. at 216 ("[I]f the identification of the holders of such title and extent and nature of the respective rights and interests of each cannot be fixed without exercising, or reviewing the exercise of, political judgment, then the judicial power is not constitutionally invoked.").

If we agreed that there were insufficient standards to determine title, it does not follow, as the Hopis maintain, that we must declare the tribes cotenants. It would be more logical for us to dismiss the case for lack of jurisdiction of the political question.

We do not agree, however, that there are no judicially ascertainable standards governing this question. We acknowledge the absence of a Navajo-Hopi boundary, as we

must. We do not concede that the question of Navajo and Hopi property interests was left open. It is a mistake to assume that the absence of a boundary negates standards for determining title. The purposes, history, and language of the 1934 Act show an intent to withdraw all reservation land for the Navajos except for pockets occupied by Hopis. We agree with the district court that this is the meaning of the "such other Indians as may already be located thereon" provision. The legislative history discussed by the district court at 448 F.Supp. 1194-96, supports this conclusion.

Congress was not inflexibly committed to the notion of exclusive areas for the two tribes. It preferred to allow the tribes to work out whatever cooperative arrangement they could. But when negotiations failed, the 1974 jurisdictional act authorized the courts to declare boundaries if one of the tribes so requested. Since its jurisdiction was invoked for this purpose, the district court properly looked to the legislative history of the 1934 Act to determine the tribes' interests.

To be sure, Congress did not specify in metes and bounds the extent of tribal property interests in the withdrawn property. Nevertheless, legislative intent is clear enough to enable us to identify Hopi interests by areas settled. Navajo interests are identifiable as the residue. Congress recognized Hopi concern over the 1882 reservation and their villages, shrines, and grazing areas outside the 1882 reservation. The "such other Indians" provision was explained to the Hopis, as protecting their rights to areas occupied outside the 1882 reservation. There is no indication that anyone contemplated joint title to the entire area involved here. In this context the Hopis' assertion of joint title must be rejected.

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The district court held that the Hopis' interest in land they were occupying in 1934 was limited to an undivided one-half interest. In effect the district court held that because the 1934 Act did not establish boundaries for exclusive Hopi lands, each tribe must have an undivided one-half interest. We have rejected this approach in determining the question of title. We must draw on legislative history to find standards for determining title.

Looking to legislative history, a stronger case can be made that Hopi interests are exclusive rather than joint. The Act was not intended to disturb then-existing land tenure patterns. Hopi villagers were told the Act would "protect the rights of the Hopi Indians to the lands they occupy around here and there is absolutely no chance of the Hopis' rights to these lands being disturbed." Ex.H. 143, at 766. It is true that the phrase "the Hopis' rights to these lands" is ambiguous. Technically speaking, neither the Hopis nor the Navajos could have had any clear idea what those rights might be. But in their natural and untechnical sense these words are not ambiguous. They say rather clearly that the 1934 Act would not disturb the Hopis' right to occupy the land they were then occupying. This is consistent with the intent of the 1934 Act to preserve a *status quo* and not to disturb existing arrangements. We therefore reverse the judgment insofar as it limits Hopi interests to an undivided one-half interest in lands they exclusively possessed, occupied, or used in 1934. Judgment should be entered declaring Hopi interests in those lands to be exclusive.

B. *Does the Court Have Jurisdiction of the Hopi Claim For An Accounting?*

The Hopis claim that jurisdiction of the claim for an accounting is conferred expressly and impliedly by the 1974

jurisdictional act. They contend that express authority is provided by 25 U.S.C. § 640d-17(c):

> Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands . . . , and to fully accomplish all objects and purposes of sections 640d to 640d-24 of this title.

They also contend that an accounting is an integral aspect of an action for partition. Therefore 25 U.S.C. § 640d-7(b), authorizing partition of jointly held lands, impliedly authorizes an accounting.

The district court rejected these contentions. See 448 F.Supp. 1183. Its conclusion was correct. Federal courts' jurisdiction being limited, the burden was on the Hopis to establish jurisdiction. The United States and Indian tribes such as the Navajos possess coextensive sovereign immunity. Tribes may be sued only with the consent of Congress. *Hamilton v. Nakai,* 453 F.2d 152, 158 (9th Cir. 1972). When Congress consents to suit, it may impose limitations. Limitations must be "strictly observed and exceptions thereto are not to be implied". *Id.* at 159 (quoting from *Soriano v. U. S.*, 352 U.S. 270, 276, 77 S.Ct. 269, 273, 1 L.Ed.2d 306 (1957). Therefore the Hopis have a heavy burden to establish jurisdiction.[6]

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6. The Hopis' characterization of the 1974 jurisdictional act as "remedial legislation" is unconvincing. The 1974 Act was intended to settle a title controversy between two quasi-sovereign Indian tribes. The Act does not create a private remedy for wrongs. Compare *Tcherepnin v. Knight,* 389 U.S. 332, 88 S.Ct. 548, 19 L.Ed.2d 564 (1967) (private remedy under securities acts).

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Section 640d-17(c) does not mention claims for accounting. There is therefore no express grant of jurisdiction of accounting claims in section 640d-17(c).

Nor do we see a sound basis for an implied jurisdictional grant. The 1974 jurisdictional act provides different procedures and remedies for the 1882 executive order reservation and for the surrounding reservation confirmed by the 1934 Act. The 1974 Act specifically provides for accountings and damages claims for lands within the 1882 reservation. 25 U.S.C. § 640d-17(a). The absence of similar provisions for the 1934 Act's lands is telling.[7] The district court gave a likely explanation for the omission. Without a prior adjudication of title, Congress could not know what kind of financial burden an accounting would impose and on which tribe. If the Hopis were entitled to one-half of the Navajo reservation, for instance, an accounting might break the Navajo bank. It is therefore likely that Congress purposefully did not authorize an accounting claim. We cannot infer one.

The Hopis contend that the legislative history of the 1974

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7. The Hopis offer an obscure explanation for this omission. They contend that an accounting and damages are authorized for the 1882 reservation lands because title to those lands had already been adjudicated (in *Healing v. Jones, supra*, 210 F.Supp. 125) when Congress passed the 1974 jurisdictional act. It was therefore possible for Congress to spell out the details of the final settlement of the 1882 title claims. In contrast, title to the 1934 Act reservation is still uncertain. Congress could not spell out the "details" of a final settlement because of this uncertainty.

This argument is strained. There is no convincing reason to believe that uncertainty over title caused Congress to provide for an accounting only impliedly. The same uncertainty did not prevent Congress from specifically allowing for partition.

jurisdictional act shows that an accounting was intended. We disagree. The legislative history shows only a desire for a final settlement of all title claims. This history might support an inference that an accounting was intended. But any inference is weak at best and cannot sustain the Hopi burden of establishing jurisdiction.

Similarly unconvincing is the Hopi contention that an accounting is merely an inherent aspect of judicial partition. The authorities they cite support such a position, but only with respect to private adjudications. None involve Indian tribes possessing attributes of sovereignty. None involve a federal statute establishing detailed processes and standards for quieting title, partition, and accountings in limited circumstances. We must strictly observe the limitations Congress has established.

The 1974 jurisdictional act, 25 U.S.C. § 640d-7, authorizes actions to quiet title and to partition lands in some circumstances. Section 640d-17(c) authorizes "further original, ancillary or supplementary actions" only if they insure "the quiet and peaceful enjoyment of the reservation lands" or to accomplish the "objects" of the Act. It is not at all clear that an action for accounting would insure quiet and peaceful enjoyment of reservation lands. The effect might be the opposite. The "objects" of the 1974 jurisdictional act with respect to the 1934 Act lands are spelled out in section 640d-7. Those objects are to quiet title and to partition certain lands. An action for accounting serves neither purpose.

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III—CONCLUSION

We remand to the district court to determine what land the Hopis "possessed, occupied, or used" in 1934. In doing so, we acknowledge the possibility that some reservation land, grazing land for instance, may have been used by both tribes in 1934. Even in villages it may not be possible for the court to conclude that the Hopis "possessed, occupied, or used" such land exclusively. In that event it may be proper on remand for the district court to declare title to be joint or undivided, subject to partition. We reverse only with respect to the district court's holding that Hopi title is necessarily non-exclusive, even with respect to land that was actually and exclusively "possessed, occupied, or used" in 1934.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED APRIL 5, 1978

Abbott SEKAQUAPTEWA, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe and all villages, clans, and Individual members of the Hopi Tribe, Plaintiff,

v.

Peter MacDONALD, Chairman of the Navajo Tribal Council of the Navajo Indian Tribe, for and on behalf of the Navajo Indian Tribe and all villages, clans, and Individual members of the Navajo Tribe, Defendant.

No. Civ. 74-842 Pct. WPC.

United States District Court,
D. Arizona.

April 5, 1978.

* * *

John S. Boyden, George J. Romney, Scott C. Pugsley of Boyden, Kennedy, Romney & Howard, Salt Lake City, Utah, Philip E. von Ammon, Donald R. Gilbert of Fennemore, Craig, von Ammon & Udall, Phoenix, Ariz., for plaintiff.

Paul F. Eckstein, Terry E. Fenzl of Brown & Bain, Phoenix, Ariz., Richard Schifter of Fried, Frank, Harris, Shriver & Kampelman, Washington, D. C., for defendant.

Appendix E

MEMORANDUM AND ORDER

COPPLE, District Judge.

Pursuant to 25 U.S.C. § 640d-7, the Hopi tribal chairman commenced an action in this district to determine the Hopi tribal rights and interests in the area described by the Act of June 14, 1934, 48 Stat. 960 (1934 Act). The 1934 Act describes the exterior boundaries of the Navajo Reservation in northeastern Arizona, and conveys an equitable interest in certain of these lands to the Navajo and "such other Indians as may already be located thereon." Before passage of the 1934 boundary bill, this area consisted of a patchwork of treaty, legislative, and executive order reservations.[1] The Hopi and Navajo tribes stipulate to the admission of the following map to illustrate the area.

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1. The 1868 rectangle was made a part of the Navajo Reservation by treaty. Treaty with the Navajos, June 1, 1868, 15 Stat. 667. By executive order, other parcels were set apart as additions to the Navajo Reservation or for Indian purposes. *See, e.g.*, Exec. Order of Oct. 29, 1878; Exec. Order of Jan. 6, 1880; Exec. Order of May 17, 1884; Exec. Order of Jan. 8, 1900. Congress added lands to the Western Navajo Indian Reservation, and created the Canyon de Chelly National Monument. Act of May 23, 1930, 46 Stat. 378; Act of Feb. 14, 1931, 46 Stat. 1161 (codified at 16 U.S.C. §§ 445 to 445b).

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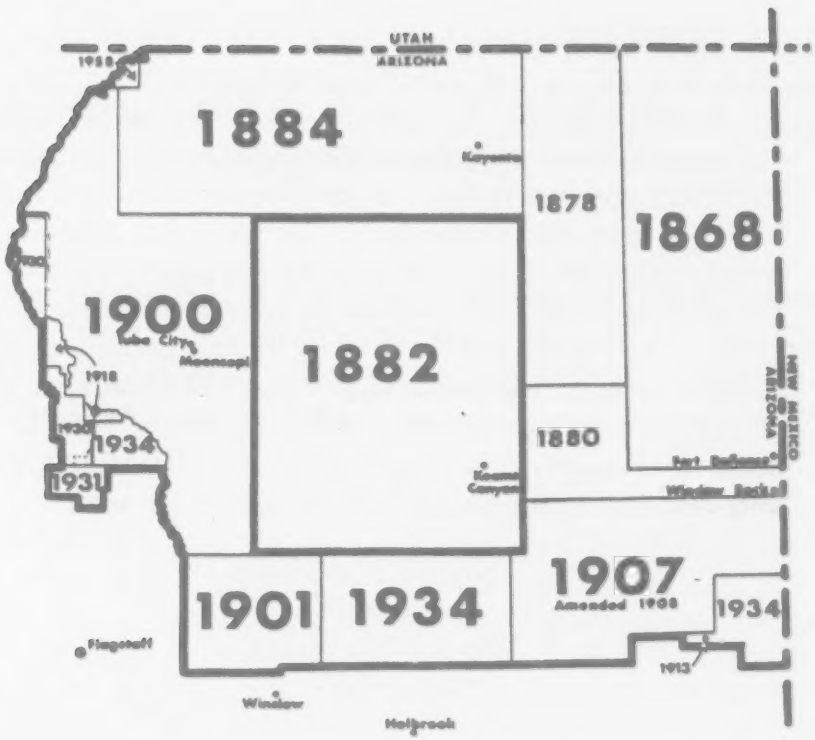

Events surrounding the 1882 rectangle, although not directly related to this case, form the backdrop of this suit. The 1882 parcel was withdrawn by Executive Order of December 16, 1882, for the benefit of the Hopi tribe and "such other Indians as the Secretary of the Interior may see fit to settle thereon." The 1934 Act does not affect the status of the 1882 Reservation, which is the subject of continuing litigation in another court within this district. *See Healing v. Jones*, 210 F.Supp. 125

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(D.Ariz. 1962), *aff'd*, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963). *Healing* documents both the bitter antagonism between the Navajo and the Hopi and the difficulties attending a judicial resolution of Navajo-Hopi land controversies. *See Hamilton v. MacDonald*, 503 F.2d 1138 (9th Cir. 1974).

This action is now before the Court upon the Navajos' motion to dismiss certain allegations in the amended complaint,[2] and on cross-motions for partial summary judgment regarding the meaning of the 1934 Act.[3] These motions raise questions of

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2. Plaintiff's motion to file an amended complaint was granted in August 1977 without reaching the merits of the Navajo opposition. The defendant has not reintroduced these objections by a motion to dismiss. However, insofar as the Navajos' objections to the amended complaint rest upon jurisdictional grounds, the Court will consider these issues sua sponte.

3. Both tribes have collected and filed volumes of documents to bolster their interpretation of the 1934 Act (hereinafter cited as Navajo Ex., Hopi Ex.). These documents actually shed little light upon the meaning of the 1934 land grant. Nonetheless, both tribes have objected to the admission of certain evidence.

On a motion for summary judgment, a district court "can consider any material that would be admissible or usable at trial." C. Wright & A. Miller, Fed.Prac. and Pro.: Civil §§ 2721, 2722; 6 Moore's Fed.Prac. ¶ 56.11 [1.-8]. Of course, Rule 56 does not relieve counsel from laying a proper evidentiary foundation. *United States v. Dibble*, 429 F.2d 598 (9th Cir. 1970). For example, the Court cannot consider witness interviews presented by the Hopi tribe because they are not properly authenticated. *See* Hopi Ex. 233, 234, 235 and 236. The major objections of the tribes presented raise issues of relevancy. Statutory construction often requires a district court to explore "the circumstances under which the statute passed, the mischief at which it was aimed, and the object it was supposed to achieve." C. Sands, Statutes and

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subject matter jurisdiction and collateral estoppel, and three overlapping issues as to the construction of the 1934 Act: (1) what property was granted by the 1934 Act, (2) who are the holders of the vested equitable interests in the 1934 Act lands, and (3) what is the nature and extent of their respective holdings.[4] Each question will be discussed seriatim.

A. *Subject Matter Jurisdiction*

The original complaint, brought by the tribal chairman on behalf of the Hopi tribe, simply requests a declaration of Hopi

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Statutory Construction § 48.03 (4th ed. 1972). Therefore, historical material bearing upon the Hopi-Navajo land disputes are relevant to this motion. Moreover, these historical documents fall within an exception to the hearsay rule. Fed.R.Evid. 803(16). However, statements made by Indian representatives or administrative officials which are not contemporaneous with the passage of the 1934 Act fall into a different category. *See Healing v. Jones*, 210 F.Supp. 125, 142-43 (D.Ariz. 1962), *aff'd*, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963). The 1934 land grant was applicable to the particular situation then existing, and subsequent events or interpretations cannot diminish or enlarge the effect of the 1934 Act. *Cf.* C. Sands, *supra* § 49.02. The Court will therefore not consider evidence regarding events long after passage of the 1934 Act. *See, e.g.*, Hopi Ex. 227 to 293.

Beyond these general comments, the Court need not embark on the time-consuming task of ruling on each of the over 100 exhibits objected to. The admissibility of the bulk of the documents is stipulated to. The Court will explicitly cite which documents among these that are relied upon in the text. For purposes of appeal, the Court adds that even assuming all the proffered exhibits are admitted, the Court's conclusions would not differ.

4. An understanding of these issues is aided by a general knowledge of the nature of tribal property rights. *See generally* F. Cohen, Handbook of Federal Indian Law 287-312 (N.Mex. ed. 1942).

rights in the area described by the 1934 Act. *See* 25 U.S.C. § 640d-7(a). The amended complaint differs in three ways. First, the amended complaint alleges a broader representational capacity for the tribal chairman. The chairman is now representative of the tribe, villages, clans, and individual members of the tribe. Next, a second claim for relief requests a partition of lands the Court may find jointly held by the Navajo and Hopi. Finally, a third claim for relief asks for an accounting for all Navajc activities on land found to be exclusively or jointly held by the Hopi tribe. The Navajos argue that the amended complaint exceeds the subject matter jurisdiction conferred on the Court. 25 U.S.C. §§ 640d to 640d-20.

The statute granting federal jurisdiction over the Hopi-Navajo land dispute within the 1882 Reservation authorized the tribal chairman to represent both tribe, villages, clans, and individual Indians. Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403; *see Healing v. Jones*, 174 F.Supp. 211 (D.Ariz.1959). The jurisdictional statute for this dispute is narrower in representational terms. 25 U.S.C. § 640d-7(a) ("Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe . . ."). Nonetheless, other sections of the jurisdictional statute assume a broad representational capacity. Section 640d-7(b) orders the Court to determine any lands in which the Hopi tribe, including villages, clans, and individuals, have an exclusive interest. Section 640d-17(c) authorizes supplemental actions on behalf of the tribe, villages, clans, and individual members. Construing the jurisdictional statute as a whole, the Court concludes that the alleged representational capacity is proper.

Section 640d-7(b) affirmatively requires the district court to partition any lands found to be jointly held by the Navajo and

Hopi. The Court plainly has jurisdiction over the Hopi second claim for relief. The third claim for an accounting is more troublesome. Section 640d-17(c) allows supplemental actions "as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes . . . and to fully accomplish all objects and purposes of sections 640d to 640d-24." The Hopi tribe argues this section allows an action for an accounting. However, section 640d-17(c) merely codifies the equitable jurisdiction of a federal court to issue ancillary bills to effectuate a court decree. *See Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir. 1972), *cert. denied*, 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332 (1972). An action for an accounting is not necessary to effectuate any decree this Court might make, or "to insure the quiet and peaceable enjoyment of the reservation lands." Moreover, the legislative directive to accomplish all purposes of the title does not detract from "the principle that the power of a court to afford a remedy must be coextensive with its jurisdiction over the subject matter." *Id.* at 156. Section 640d-7 grants the Court jurisdiction to quiet title and partition jointly held land. Damages is not the object or purpose of the jurisdictional grant. Furthermore, Congress explicitly authorized an action for an accounting in supplemental proceedings in *Healing*. *See* 25 U.S.C. § 640d-17(a). Congressional silence presumably bars such a remedy in this action. Indeed, it is unlikely Congress would allow a damage remedy without first ascertaining the extent and nature of the Hopi interest in the 1934 Act lands. Otherwise, if a district court ruled the Hopi tribe has an undivided one-half interest in all the 1934 Act lands, then a concomitant damage remedy probably would obliterate the Navajo treasury. Therefore, the third claim for relief will be dismissed.

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B. *Collateral Estoppel*

In 1951 the Hopi tribe brought an action against the United States before the Indian Claims Commission alleging the government occupied and possessed without compensation the tribe's aboriginal land. *See* 25 U.S.C. §§ 70 to 70v. "Aboriginal title" depends upon a factual determination. "[A]boriginal title must rest on actual, exclusive, and continuous use and occupancy 'for a long time' prior to the loss of the property." *Sac & Fox Tribe v. United States*, 161 Ct.Cl. 189, 315 F.2d 896, 903 (1963), *cert. denied*, 375 U.S. 921, 84 S.Ct. 266, 11 L.Ed.2d 165 (1963); *see also Strong v. United States*, 207 Ct.Cl. 254, 518 F.2d 56, 560 (1975), *cert. denied*, 423 U.S. 1015, 96 S.Ct. 448, 46 L.Ed.2d 386 (1975); F. Cohen, Handbook of Federal Indian Law 291-94 (N.Mex. ed. 1942). The Hopi tribe asserted an aboriginal title claim extending approximately over three-quarters of the 1934 Act lands. The Hopi action was consolidated with a petition filed by the Navajo tribe also alleging the uncompensated taking of Navajo aboriginal land.

The Indian Claims Commission denied the Hopi tribe's aboriginal title claim to all of the territory alleged. Rather, the Commission held the Hopi tribe possessed aboriginal title to a smaller area which included the 1882 Reservation. This title was extinguished without compensation as to all lands outside the 1882 Reservation when the Executive Order of December 16, 1882 issued. The Hopis' aboriginal title to land within the 1882 Reservation was extinguished partially in 1937 when the Navajo tribe was administratively settled within the area. *See Healing v. Jones*, 210 F.Supp. 125 (D.Ariz.1962), *aff'd*, 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963). The Commission ordered the case to proceed to a determination of damages. *See Hopi Tribe v. United States*, 31 Ind.Cl.Comm. 16 (1973); *Hopi Tribe v. United States*, 23 Ind.Cl.Comm. 277 (1970).

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The defendant claims this decision collaterally bars the Hopi tribe from asserting title to the lands litigated before the Indian Claims Commission. However, in this action the Hopi tribe seeks to quiet title to land under the doctrine of "recognized title." Recognized title differs from aboriginal title.

> Where Congress has by treaty or statute conferred upon the Indians or acknowledged in the Indians the right to permanently occupy and use land, then the Indians have a right or title to that land which has been variously referred to in court decisions as "treaty title", "reservation title", and "acknowledged title." As noted by the Commission, there exists no one particular form for such Congressional recognition or acknowledgement of a tribe's right to occupy permanently land and that right may be established in a variety of ways.

Miami Tribe v. United States, 146 Ct.Cl. 421,175 F.Supp. 926, 936 (1959). "The significance of the recognized title doctrine generally lies in the fact that a plaintiff successful on this issue need not present proof demonstrating aboriginal use and occupancy." *Strong v. United States, supra* at 563; F. Cohen, *supra* at 291-99. Therefore, the issues of fact and law before the Indian Claims Commission have no bearing whatsoever to this action. It is axiomatic that collateral estoppel does not apply to unlitigated and undetermined issues. 1b Moore's Fed. Prac. ¶0.443[1].

Nonetheless, the Navajo tribe argues that issues pertaining to the 1934 Act were decided on appeal to the Court of Claims

adversely to the Hopi. The Hopi brief to the Court of Claims indicates the contrary, however.[5] The Hopi tribe argued that aboriginal title in certain lands outside the 1882 Reservation continued until 1934. The 1934 Act extinguished one-half of the Hopi interest in this territory. Hopi argument was not persuasive to the Court of Claims, who affirmed by memorandum decision the judgment of the Indian Claims Commission.[6] By necessarily concluding that Hopi aboriginal title outside the 1882 Reservation was extinguished in 1882, the Court of Claims never reached any issues concerning the 1934 Act. Collateral estoppel is inappropriate as to issues which were neither essential nor necessary to judgment. *Id.* Therefore, the Hopi tribe is not collaterally estopped in any respect from asserting property rights under the 1934 Act.

C. *What Property Was Granted by the 1934 Act*

The relevant granting clause of the 1934 Act follows:

> . . . That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows . . . [boundary description]. *All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals*

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5. The brief is reproduced at Navajo Ex. E, Appendix to Navajo Motion for Partial Summary Judgment, *Sekaquaptewa v. MacDonald*, Civ. 74-842, Docket No. 44 (April 26, 1977).

6. The memorandum decision is reproduced at Exhibit G, Appendix to Navajo Motion for Partial Summary Judgment, *Sekaquaptewa v. MacDonald*, Civ. 7842, Docket No. 44 (April 26, 1977).

> *of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act*, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16,1882.

(emphasis added). Which lands were "vacant, unreserved, and unappropriated" is a question of fact not before the Court on this motion. The parties dispute which of the lands withdrawn by executive order in 1878, 1880, 1884, 1900, 1901, 1907, and 1918 were "temporary withdrawals of public lands in Arizona."

The Hopis argue that all executive order withdrawals of public land prior to June 1934 were "temporary." An executive order reservation grants an Indian tribe only a "mere temporary and cancellable possessory right." *Ute Indians v. United States*, 330 U.S. 169, 178, 67 S.Ct. 650, 654, 91 S.Ct. 823 (1947). While occupying an executive order reservation, Indians are no more than tenants at the will of the government.

> . . . the status of executive order reservations can be summarized as follows: the Indians have the exclusive right to possession but title to the lands remains with the United States. Congress has plenary authority to control use, grant adverse interests or extinguish the Indian title. In these respects,

> executive order reservations do not differ from treaty or statutory reservations. The one difference is that so long as Congress has not recognized compensable interests in the Indians, executive order reservations may be terminated by Congress or the Executive without payment of compensation.

United States v. Southern Pacific Transportation Co., 543 F.2d 676, 687 (9th Cir. 1976). The Court agrees that a "temporary withdrawal" under the 1934 Act refers to the unique status of an executive order reservation as opposed to legislatively conferred, compensable "recognized title."[7]

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7. The Navajo tribe attempts to distinguish temporary from permanent withdrawals in a more abstract manner. The argument begins with *United States v. Midwest Oil Co.*, 236 U.S. 459, 35 S.Ct. 309, 59 L.Ed. 673 (1915). In *Midwest Oil*, the Court held that the President had the power to withdraw public lands from potential mining claims pending further legislation. The Court found that Congress had granted this power to the Executive by a history of long acquiescence. The *Midwest Oil* Court rejected a distinction between temporary and permanent executive land withdrawals offered by the appellees.

> The appellees, however, argue that the practice thus approved [by Congress in the past], related to reservations, — to cases where the land had been reserved for military or other special public purposes, — and they contend that even if the President could reserve land for a public purpose or for naval uses, it does not follow that he can withdraw land in aid of legislation. When analyzed, this proposition, in effect seeks to make a distinction between a reservation and a withdrawal, — between a reservation for a purpose not provided for by existing legislation, and a withdrawal made in aid of future legislation. It would

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> mean that a permanent reservation for a purpose designated by the President, but not provided for by statute, would be valid, while a merely temporary withdrawal to enable Congress to legislate in the public interest would be invalid. It is only necessary to point out that, as the greater includes the less, the power to make permanent reservations includes power to make temporary withdrawals. For there is no distinction in principle between the two. The character of the power exerted is the same in both cases. In both, the order is made to serve the public interest, and in both the effect on the intending settler or miner is the same.

Id. at 475-76, 35 S.Ct. at 314. Congress has since eliminated any implied Executive withdrawal power. Fed. Land Policy and Management Act of 1976, Pub. L. No. 94-579 § 704(a), 90 Stat. 2743.

Midwest Oil concerned a controversy which arose before passage of the Pickett Act in 1910. Act of June 25, 1910, 36 Stat. 847 (codified at 43 U.S.C. §§ 141 to 143), *repealed* Fed. Land Policy and Management Act of 1976, Pub. L. No. 94-579 § 704(a), 90 Stat. 2743. The Pickett Act expressly authorized the President to "*temporarily withdraw* from settlement, location, sale, or entry any of the public lands . . . and reserve the same for . . . public purposes to be specified in the orders of withdrawals." 43 U.S.C. § 141 (emphasis added). Lands withdrawn under the Pickett Act remained open to "exploration, discovery, occupation, and purchase under the mining laws." *Id.* § 142. After passage of the Pickett Act, the question arose whether the President could withdraw lands so that they would not be subject to the mining laws. Then Attorney General Robert Jackson argued that the President could withdraw lands which were not subject to mining claims. 40 Op. Att'y Gen. 73 (1941). Jackson reasoned that the Pickett Act legislated only as to temporary withdrawals, and did not touch permanent executive order withdrawals.

> It is desirable to point out preliminarily that there is a

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> recognized difference between the two kinds of withdrawals. It is true the Supreme Court stated in the *Midwest* case . . . that there was no distinction in principle between a permanent reservation and a temporary withdrawal. But it seems clear the Court was referring to the question of power, not to types of withdrawal. The Court referred to differing factual situations in which one type is used and not the other. Thus it gave instances of withdrawals in aid of legislation (pp. 476-80 [35 S.Ct. 309]), and of withdrawals for reservations for public uses (pp. 470-1 [35 S.Ct. 309]), the latter including withdrawals for the establishment of bird refuges, enlargement of Indian or military reservations, the setting aside of land for water, timber, fuel, hay, signal stations, and target ranges.

Id. at 76. Exploring the legislative history of the Pickett Act, Jackson concluded:

> When lands are withdrawn temporarily for a purpose coming within the 1910 Act, those lands are subject to the terms of that act and accordingly said mining laws apply. If, however, the lands are not withdrawn temporarily for a purpose within the 1910 Act, but for permanent use by the Government for other and authorized uses, the mining laws made applicable to lands withdrawn under the 1910 Act do not apply . . . . *This is so notwithstanding the withdrawal now contemplated and any other permanent withdrawal may be temporary in the very broad sense that they may be subsequently revoked by the President or by Congress.*

Id. at 81 (emphasis added). Apparently, the Jackson view is accepted in this circuit.

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> Thus "temporary" and "permanent" do not have meanings in terms of time. Rather they are words which go to the nature of the withdrawal. A withdrawal of lands and their reservation for a present use rendered necessary for the discharge of the responsibilities vested in the Executive branch of the Government is said to be permanent. These reservations have been made for such purposes as post offices, military and Indian reservations, light houses, and the like. A withdrawal of lands for a public purpose, as distinguished from use, is said to be temporary.

J. Lowe, *Withdrawals and Similar Matters Affecting Public Lands*, 4 Rocky Mt.Min.L.Inst. 55, 62 (1958), *cited approvingly, United States v. Consolidated Mines & Smelting Co., Ltd.*, 455 F.2d 432, 444-45 (9th Cir. 1971).

The Jackson distinction between temporary and permanent withdrawals was echoed by Felix Cohen, acting solicitor to the Department of the Interior, in a memorandum on the "Validity of Orders Temporarily Withdrawing Public Land in Aid of Legislation Looking to the Establishment of Indian Reservations."

> . . . when the word "temporary" is used with respect to withdrawals in aid of legislation, the word "temporary" is used in contradistinction to the word "permanent." The executive practice upheld in the *Midwest Oil Co.* case embraced two types of public land withdrawals — permanent withdrawals intended to be effective immediately for the purposes for which the lands were withdrawn, and temporary withdrawals such as those now under consideration, in which public land was withdrawn for the purpose of maintaining the status of the land free of private claims until such time as the Congress itself had taken action.

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The Navajo tribe argues that certain executive order withdrawals still fall outside the 1934 Act. The tribe reasons that Congress recognized title in the Navajo to some areas within the 1934 boundary bill before its passage. For example, an Appropriations Act of May 27, 1902, 32 Stat. 264, recognized a

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60 I.D. 54, 56-57 (1947). On the basis of these distinctions, the Navajo tribe argues that certain executive order withdrawals within the 1934 Act boundaries were permanent ones, and, therefore, not granted by the 1934 Act. For example, the Executive Order of October 29, 1878, states:

> It is hereby ordered that the tract of country in the Territory of Arizona lying within the following described boundaries . . . be, and the same hereby is, withdrawn from sale and settlement and set apart as an addition to the present reservation for the Navajo Indians.

The Navajo tribe characterizes this executive order withdrawal as a withdrawal for immediate present use, and, therefore, a "permanent" withdrawal.

The Court is not persuaded that the Jackson distinction is a meaningful one to apply to the 1934 Act. After all, the distinction arose from an Executive attempt to justify land withdrawals seemingly at odds with legislative directives. The 1934 Act states that "All . . . temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order . . . are hereby permanently withdrawn . . . ." Considering the juxtaposition of "temporary" and "permanent" within the 1934 Act, it is reasonable to assume Congress intended to change the Indian land status from a tenancy at will to a permanent compensable interest. Although the legislative history of the 1934 Act is silent as to this question of construction, there is no indication whatsoever that any of the prior executive order withdrawals were excluded from the 1934 grant. If Congress intended to legislate as to one type of withdrawal and not to the other, the Court would expect some expression of this purpose. Therefore, the Court will not apply the Jackson distinction between permanent and temporary executive order withdrawals.

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Navajo compensable interest in the area withdrawn by the Executive Order of Jan. 8,1900. The Act of March 3, 1927, 44 Stat. 1347 (codified at 25 U.S.C. § 398d), which froze the boundaries of all executive order reservations, recognized Navajo title in other executive order reservations within the 1934 Act boundaries.

The issue raised is whether Congress recognized rights of permanent occupancy before the 1934 Act?

> An Indian Reservation created by Executive Order of the President conveys no right of use or occupancy to the beneficiaries beyond the pleasure of Congress or the President. Such rights may be terminated by the unilateral action of the United States without legal liability for compensation in any form even though Congress has permitted suit on the claim . . . When a reservation is established by a treaty ratified by the Senate or a statute, the quality of the rights thereby secured to the occupants of the reservation depends upon the language or purpose of the Congressional action. Since Congress, under the Constitution, § 3 of Art. IV, has the power to dispose of the lands of the United States, it may convey to or recognize such rights in the Indians, even a title equal to fee simple, as in its judgment is just. . . . *When Congress intends to delegate power to turn over lands to the Indians permanently, one would expect to and doubtless would find definite indications of such a purpose.*

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Hynes v. Grimes Packing Co., 337 U.S. 86, 103-04, 69 S.Ct. 968, 979, 93 L.Ed. 1231 (1949) (emphasis added). The legal standard for recognized title rests upon the clear intent of Congress. "There is no particular form for congressional recognition of Indian right of permanent occupancy. It may be established in a variety of ways but there must be the definite intention by congressional action or authority to accord legal rights, not merely permissive occupancy." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79, 75 S.Ct. 313, 317, 99 L.Ed. 314 (1955).

The Navajo tribe suggests that land withdrawn by the Executive Order of January 8, 1900, was permanently reserved by Congress. This congressional intent can be found in the Appropriations Act of May 27, 1902, 32 Stat. 264. This act provides for the purchase of the title of certain settlers located at Tuba City within the 1900 executive order reservation. In particular, the appropriations allowed the Secretary of the Interior to purchase the rights and improvements of about 20 Morman families at Tuba City. On its face, this statute does not show a "definite intention by congressional action or authority to accord legal rights." Moreover, nothing in the legislative history cited by the Navajo tribe indicates such a clear purpose. Indeed, the Navajo position leads to an anomalous result. The Hopi village of Moencopi is within the 1900 executive order reservation. One stumbling block to passage of the 1934 Act was the presence of this Hopi village. The Navajo tribe would read the status of the Moencopi village completely out of the 1934 Act.

The Act of March 3, 1927, 44 Stat. 1347, states:

Changes in the boundaries of reservations

> created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress. . . .

(codified at 25 U.S.C. § 398d); *see also* Act of May 25,1918, 40 Stat. 570 (codified at 25 U.S.C. § 211) ("No Indian reservations shall be created, within the limits of the States of New Mexico and Arizona, except by Act of Congress."). A law review writer has argued that the 1927 Act is a congressional recognition of compensable tribal property interests in executive order reservations. Note, *Tribal Property Interests in Executive Order Reservations: A Compensable Indian Right*, 69 Yale L.J. 627 (1960). The Navajo tribe argues the Court should adopt the views of this article. The question is one of first impression. *Cf. United States v. Southern Pacific Transportation Co., supra* at 687.

In *Healing v. Jones*, 174 F.Supp. 211 (D.Ariz.1959), the Court either implicitly rejected or overlooked the argument that compensable interests were created by the 1927 Act. The *Healing* Court held that equitable interests in the 1882 executive order reservation were not vested until congressional recognition in 1958. *Id.* at 216; Note, *supra* at 639. Whether by oversight or omission, the *Healing* Court is correct. On its face, the 1927 Act does not show a "definite intention by congressional action or authority to accord legal rights." Rather, the Act merely limits executive rights and clearly defines congressional initiative. From the bulky legislative history of the 1927 Act, the only direct evidence as to congressional intent comes with the House Report to a prior version of the Act which was vetoed by the President on other grounds.

> Nothing in this bill is intended to in any

> manner change or alter the ownership or legal and equitable title to the lands described by its terms. The question of what rights the Indians may have in and to Executive order reservations will not be affected by its passage and the courts can squarely decide that issue without reference to this legislation.

H.R.Rep. No. 763, 69th Cong., 1st Sess. (1926). The House and Senate Reports on the final 1927 Act are silent on the issue of recognized title. *See* S.Rep. No. 1240, 69th Cong., 2d Sess. (1927); H.R.Rep. No. 1791, 69th Cong., 2d Sess. (1927). Although the Navajo tribe can point to language of individual members of Congress expressing a concern to vest permanent rights to the Indians, these speeches are hardly dispositive. C. Sands, Statutes and Statutory Construction § 48.13. Therefore, the Court concludes that the 1927 Act recognized no compensable property interests in the Indian tribes on executive order reservations.

D. *Who are the Holders of the Vested Equitable Interests*

The granting clause of the 1934 Act states:

> . . . [description of lands], are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and *such other Indians* as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16,1882.

(emphasis added). As a named grantee, the Navajo tribe is one holder of the equitable interests. The Court takes judicial notice that a Hopi village existed at Moencopi on June 14, 1934. Moencopi is within the 1934 Act land grant, and, therefore, the Hopi are within the "such other Indians" clause and are holders of equitable interests.

The issue arises whether any other Indian tribe may be a grantee within the meaning of the 1934 Act? The Hopi tribe urges the Court to rule that, as a matter of law, the Hopi are the only "other Indians" referred to by the 1934 Act. After all, the legislative history to the 1934 Act demonstrates a congressional concern solely for the Hopi and Navajo tribes. The defect in the Hopi argument is that Congress was capable of naming the Hopi tribe if it wished to limit the grant solely to the Hopi and Navajo. The Court declines to reach this issue. This action only requires the Court to decide between the competing claims of the Navajo and Hopi. 25 U.S.C. § 640d-7. The Court holds below that the Hopi interest in the 1934 Act lands is tied to Hopi occupation, possession, or use of the lands on June 14, 1934. Inasmuch as an Indian tribe's presence within the 1934 area does not vest a proportionate undivided interest in the entire 1934 reservation, the Court need not decide whether the Hopis are the sole "other Indians" under the 1934 Act.

E. *What is the Nature and Extent of the Holdings*

The granting clause of the 1934 Act withdraws land "for the benefit of the Navajo and such other Indians as may already be located thereon." The Hopi tribe argues that the words "as may already be located thereon" merely designate the recipients of the 1934 Act. The Navajo tribe argues that these words both designate the grantees and limit the interest of the grantees to parcels of land actually occupied on June 14, 1934.

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> Any words in a conveyance which operate to designate a conveyance are called "words of purchase". . . . In contrast therewith, any words in a conveyance which operate to designate the extent of the interest acquired by a conveyee are called "words of limitation."

Restatement Property § 312 Intro. Note. The issue, therefore, is whether "as may already be located thereon" are words of limitation or words of purchase or both? The Court must first look to the language of the statute to resolve the question. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976).

The plain wording of the 1934 Act is ambiguous. For example, the 1934 Act grants an equitable interest in "vacant, unreserved, and unappropriated" public lands. Vacant lands are those lands which are absolutely free, unclaimed, and unoccupied. *Donley v. Van Horn*, 49 Cal.App. 383,193 P. 514, 517 (1920). Under the Navajo interpretation of the 1934 Act, Congress granted an equitable interest in these vacant lands to the Hopi only if the Hopi occupied the land. The condition nullifies the grant. If Congress wished to limit the "such other Indian" grant to land actually occupied, Congress could do so in plainer language. *See Missionary Society v. Dalles*, 107 U.S. 336, 339, 2 S.Ct. 672, 27 L.Ed. 545 (1882) (1848 Act confirms and establishes title to certain land occupied by missionaries, not exceeding 640 acres, on the date of enactment); *cf. Tee-Hit-Ton Indians v. United States, supra*, 348 U.S., at 291, 75 S.Ct. 1313 (Douglas, J., dissenting) (1884 Organic Act for Alaska states Indians shall not be disturbed in possession of lands actually in their use and occupancy). The Hopi interpretation is also

troublesome. The title of the 1934 Act states "Exterior Boundaries of Navajo Reservation in Arizona." Nonetheless, the Hopi tribe claims an undivided one-half interest in most of the reservation.

The congressional record on the 1934 Act is sparse. The Senate and House reports, which largely incorporate an explanatory letter from the Secretary of the Interior, are of little guidance. The Secretary addresses Hopi land rights in one terse sentence.

> It is of importance to observe that section 1 (p. 4, lines 12 to 14, inclusive) contains a provision safeguarding the rights of the Hopi Indians to their lands, which are centrally located within the present Navajo Reservation.

S.Rep. No. 1012, 73d Cong., 2d Sess. 2 (1934); H.R.Rep. No. 1602, 73d Cong., 2d Sess. 2 (1934). However, page 4, lines 12 to 14, merely preserves the existing status of the 1882 Hopi Reservation. *See* H.R. 8927, 73d Cong., 2d Sess. (April 3, 1934). The Congress is silent as to the meaning of the preceding "such other Indians" clause.

Apparently, only one legislative hearing was held on the boundary bill in 1932. *See A Proposed Bill to Define the Exterior Boundaries of the Navajo Reservation in Arizona: Hearing on S. 2213 Before the Senate Comm. on Indian Affairs*, 72d Cong., 2d Sess. (1932). The hearings concerned a bill proposed by the Bureau of Indian Affairs relating to Hopi-Navajo segregation.[8]

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8. Senators Hayden and Bratton originally introduced a bill to eliminate (Cont'd)

Id. at 3. The bill not only contained the "such other Indians as may already be located thereon" clause, but also authorized the Secretary of the Interior to set apart from time to time lands within the boundary bill for the exclusive use and benefit of the Hopi. *Id.* at 4. The proposed bill made no mention of the 1882 Hopi Reservation. No senator expressed his views on the meaning of the "such other Indians as may already be located thereon" language; however, the Assistant Commissioner of Indian Affairs submitted for the record minutes of four meetings between administrators of the Indian Bureau and representatives of the Hopi villages. At these meetings, the Indian Bureau explained the "whole meaning of this bill." *Id.* at 29.

The first meeting took place on the First Mesa with members of the Tewa, Sichumovi, and Walpi villages.

> Mr. Stewart: Now we are going back to section 1 of the bill, especially that part reading that the lands in those lines are to be permanently for the benefit of the Navajos and such other Indians as may already be located thereon. Now I want you to especially bear in mind that by the "as may already be located thereon" that is put in the bill to especially protect the rights of the Hopi

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"checkerboard" control of the lands in northeastern Arizona and New Mexico between Indian and private landowners. S. 5557, 71st Cong., 3d Sess. (Jan. 5, 1931). No action was taken on this bill pending further study upon the area. *See Report of H. J. Hagerman on the Navajo Indian Reservation*, S.Doc. No. 64, 72d Cong., 1st Sess. (1932). The proposed bill of the Bureau of Indian Affairs not only eliminated checkerboard ownership of the land, but also provided a comprehensive solution to the persistent problems between the Navajos and the Hopis.

Indians to the lands they occupy around here and there is absolutely no chance of the Hopis' rights to these lands being disturbed.

Now we are going on to that part reading: "*Provided further*, That the Secretary of the Interior is hereby authorized to determine and set apart from time to time for the exclusive use and benefit of the Hopi Indians, such areas within the Navajo boundary line above defined as may in his judgment be needed for the use of said Indians."

I will explain to you that this means that at any time in the future if the Hopi Indians want a separate boundary line for themselves the Secretary of the Interior can set that aside. I want to assure you that it only contemplates a separate Hopi boundary line if the Hopi Indians themselves want it. As Mr. Radcliffe explained a little while ago, suggestions have been made to us by our own field men and white persons outside the Indian Service who are apparently friendly to the Hopis that certain lines should be adopted as their permanent boundary lines. Those lines involve this one large area here which covers all of these villages and the lands the Hopis have been using. . . . That area covers about 500,000 acres and in addition to that area it has been suggested that an area of about 32,000 acres be set aside for the use of Moencopi Wash Hopi Indians.

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Mr. Radcliffe: The area on the Moencopi Wash is outside the Hopi reservation.

Mr. Stewart: Should the Hopi Indians decide that they want separate boundaries we propose to fence the lands that are set aside for them.

. . . . . .

Id. at 34-35. A similar explanation was given at each subsequent meeting. *See id.* at 39 (Minutes of meeting at Second Mesa, villages of Mishongovi and Shipaulovi) ("Now I want especially for you to bear in mind that by the 'as may already be located thereon' that is put in the bill to especially protect the rights of the Hopi Indians to the lands they occupy around here and there is absolutely no chance of the Hopis' rights to these lands being disturbed"); *id.* at 54 (Minutes of meeting at Third Mesa, Oraibi village) ("We put that phrase 'and such other Indians as may already be located thereon' in the bill so as to protect especially the rights of the Hopi Indians to what is called their reservation"); *id.* at 68 (Minutes of meeting at Third Mesa, villages of Hotevilla and Bacabi) ("That phrase 'and such other Indians as may already be located thereon' was especially put in this bill so as to protect the rights of the Hopi Indians in there to this so-called Hopi Reservation. In other words, to protect their rights to the land they are now using and occupying. I want to emphasize that fact, that the bill as now drawn does not in any way affect or change the present so-called Hopi Reservation"). This administrative interpretation of the boundary bill was presented to the Senate, and presumably, is consistent with the congressional understanding of the 1934 Act.

The proposed bill of the Bureau of Indian Affairs did not

preserve the 1882 executive order reservation. The "as may already be located thereon" language was added to protect Hopi property rights. Commissioner of Indian Affairs Rhoads explains the addition in a letter of September 22, 1932, to M. Billingsley, a friend of the Hopi: [9]

> Regarding your view that the present proposed bill does not define any particular area for the Hopis, and hence will give title to all the lands to the Navajo — including the present Hopi areas — . . . there is enclosed our revised copy of the bill . . .
>
> Your particular attention is invited . . . [to these lines] reading as follows:
>
> > Are thereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon.
>
> It will be readily seen that this language will fully protect the rights and interests of the Hopi Indians within the area covered by the proposed bill until such time as the Hopi Indians themselves agree to some definite boundary, which we hope will be somewhat along the lines indicated on the enclosed blue prints.

See also Letter from C. J. Rhoads to Otto Lomavitu (Sept. 24,

9. The letter is reproduced at Navajo Ex. 94.

1932) (change was made to fully protect rights and interests of Hopi Indians within the area).[10] The new clause did not quiet the controversy, however. After the 1932 congressional hearing, the Bureau eliminated all reference to a segregated area for the Hopi Indians and added a proviso that the bill would not affect the status of the 1882 Hopi Reservation. Letter from Ray Wilbur to M. Billingsley (Jan. 5, 1933); Letter from Henry Scattergood to Edgar Miller (Jan. 14, 1933).[11]

After Senator Hayden introduced an amended Navajo boundary bill in February 1933, no mention was made of the Hopi-Navajo land dispute. S. 5696, 72d Cong., 2d Sess. (Feb. 28, 1933). Although no longer affecting the status of the 1882 Hopi Reservation, the new bill continued to withdraw the land "for the benefit of the Navajo and such other Indians as may already be located thereon." The only meaning this clause could plausibly be given in light of the legislative history is to protect the rights and interests of the Hopi tribe to the land they were occupying and using outside the 1882 Reservation on June 14, 1934. Inasmuch as the 1934 Act did not attempt to separate Hopi and Navajo property interests, the Hopi tribe and the Navajo tribe each received an undivided one-half interest in these lands. However, the Navajo attempt to limit Hopi rights and interests to land actually occupied by the Hopi is misplaced. The 1934 Act protects both Hopi occupancy and land use. For example, grazing land and religious shrines may fall within the scope of the land grant to the Hopi. These issues present a mixed question of law and fact, however, and the Court will not rule at this time on what types of land uses are sufficient to create a property

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10. The letter is reproduced at Navajo Ex. 95.

11. These letters are reproduced at Navajo Ex. 101 and 102.

interest under the 1934 Act. After discovery, the Court can determine which kinds of Hopi possession or use on June 14, 1934 were substantial enough to create property rights within the area set aside by the boundary bill. Therefore,

IT IS ORDERED:

1. The Navajo tribe's motion to dismiss the third claim for relief is granted.

2. The Navajo tribe's motion to dismiss the amended complaint is denied in all other respects.

3. The Hopi tribe's motion for summary judgment is denied.

4. The Navajo tribe's motion for summary judgment is granted insofar as it is consistent with this memorandum and order.

5. Counsel for the Navajo tribe will prepare a form of judgment consistent with this opinion, approved by the Hopi tribe as to form only, and lodge it with the Court within ten (10) days from the filing of this order.

APPENDIX F — RELEVANT STATUTES

Act of June 14, 1934, 48 Stat. 960
("1934 Act")

AN ACT

To define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: Beginning at a point common to the States of Arizona, New Mexico, Colorado, and Utah, thence west along the boundary line between the States of Arizona and Utah to a point where said boundary line intersects the Colorado River; thence down the south bank of that stream to its confluence with the Little Colorado River; thence following the north bank of the Little Colorado River to a point opposite the east boundary of the Grand Canyon National Park; thence south along said east boundary to the southeast corner of section 5, township 30 north, range 6 east, Gila and Salt River base and meridian, Arizona; thence east to the southeast corner of section 4; thence south to the southwest corner of section 10; thence east to the southeast corner of section 10; thence south to the southwest corner of section 14; thence east to the northwest corner of the northeast quarter section 23; thence south two miles to the southeast corner of the southwest quarter section 26; thence west one half mile to the southeast corner of section 27, township 30 north, range 6 east, Gila and Salt River base and meridian, Arizona; thence south seven miles to the southwest corner of section 35, township 29 north, range 6 east; thence east one mile; thence south one and one half miles to the southwest corner of the northwest quarter

section 12, township 28 north, range 6 east; thence east through the center of section 12 to the range line between ranges 6 and 7 east; thence west three miles to the southwest corner of section 3, township 27 north, range 6 east; thence south five miles to the southeast corner of section 33, township 27 north, range 6 east; thence east along township line between townships 26 and 27, six and one half miles, to the northeast corner of the northwest quarter section 3, township 26 north, range 7 east; thence south two miles to the southeast corner of the southwest quarter section 10, township 26 north, range 7 east; thence east four and one half miles to the southeast corner of section 8, township 26 north, range 8 east; thence north four miles to the northwest corner of section 28, township 27 north, range 8 east, Gila and Salt River base and meridian; thence east one mile to the southeast corner of section 21; thence north four miles to the northeast corner of section 4, township 27 north, range 8 east, thence east along township line between townships 27 and 28 north to its intersection with the Little Colorado River; thence up the middle of that stream to the intersection of the present west boundary of the Leupp Extension Reservation created by Executive order of November 14, 1901; thence south along the present western boundary of said extension to where it intersects the fifth standard parallel north; thence east along said standard parallel to the southwest corner of township 21 north, range 26 east, Gila and Salt River base and meridian; thence north six miles to the northwest corner of township 21 north, range 26 east; thence east twelve miles to the northeast corner of township 21 north, range 27 east; thence south two miles; thence east twelve miles; thence south four miles; thence east along the township line between townships 20 and 21 north to the boundary line between the States of New Mexico and Arizona; thence north along said boundary line to the point of beginning. All vacant, unreserved, and unappropriated public lands, including all temporary

withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882. There are hereby excluded from the reservation as above defined all lands heretofore designated by the Secretary of the Interior pursuant to section 28 of the Arizona Enabling Act of June 20, 1910 (30 Stat.L. 575), as being valuable for water-power purposes and all lands withdrawn or classified as power-site lands, saving to the Indians, nevertheless, the exclusive right to occupy and use such designated and classified lands until they shall be required for power purposes or other uses under the authority of the United States: *Provided,* That nothing in this Act contained shall be construed as authorizing the payment of proceeds or royalties to the Navajo Indians from water power developed within the areas added to the Navajo Reservation pursuant to section 1 of this Act; and the Federal Water Power Act of June 10, 1920 (41 Stat.L. 1063), and amendments thereto, shall operate for the benefit of the State of Arizona as if such lands were vacant, unreserved, and unappropriated public lands. All valid rights and claims initiated under the public land laws prior to approval hereof involving any lands within the areas so defined, shall not be affected by this Act.

Sec. 2. The Secretary of the Interior is hereby authorized in his discretion, under rules and regulations to be prescribed by him, to accept relinquishments and reconveyances to the United States of such privately owned lands, as in his opinion are desirable for and should be reserved for the use and benefit of the

Appendix F

Navajo Tribe of Indians, including patented and nonpatented Indian allotments and selections, within the counties of Apache, Navajo, and Coconino, Arizona; and any Indian so relinquishing his or her right shall be entitled to make lieu selections within the areas consolidated for Indian purposes by this Act. Upon conveyance to the United States of a good and sufficient title to any such privately owned land, except Indian allotments and selections, the owners thereof, or their assigns, are hereby authorized, under regulations of the Secretary of the Interior, to select from the unappropriated, unreserved, and non-mineral public lands of the United States within said counties in the State of Arizona lands approximately equal in value to the lands thus conveyed, and where surrendered lands contain springs or living waters, selection of other lands taken in lieu thereof may be of like character or quality, such values to be determined by the Secretary of the Interior, who is hereby authorized to issue patents for the lieu lands so selected. In all selections of lieu lands under section 2 of this Act notice to any interested party shall be by publication. Any privately owned lands relinquished to the United States under section 2 of this Act shall be held in trust for the Navajo Tribe of Indians; and relinquishments in Navajo County, Arizona, excluding Indian allotments and selections, shall not extend south of the township line between townships 20 and 21 north, Gila and Salt River base and meridian. The State of Arizona may relinquish such tracts of school land within the boundary of the Navajo Reservation, as defined by section 1 of this Act, as it may see fit in favor of said Indians, and shall have the right to select other unreserved and nonmineral public lands contiguous or noncontiguous, located within the three counties involved equal in value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Arizona Enabling Act of June 20, 1910 (36 Stat.L. 558), except as to the payment of fees or commissions which are hereby waived.

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Pending the completion of exchanges and consolidations authorized by section 2 of this Act, no further allotments of public lands to Navajo Indians shall be made in the counties of Apache, Navajo, and Coconino, Arizona, nor shall further Indian homesteads be initiated or allowed in said counties to Navajo Indians under the Act of July 4, 1884 (23 Stat.L. 96); and thereafter should allotments to Navajo Indians be made within the above-named counties, they shall be confined to land within the boundaries defined by section 1 of this Act.

Sec. 3. Upon the completion of exchanges and consolidations authorized by section 2 of this Act, the State of Arizona may, under rules and regulations to be prescribed by the Secretary of the Interior, relinquish to the United States such of its remaining school lands in Coconino, Navajo, and Apache Counties as it may see fit; and shall have the right to select from the vacant, unreserved, and nonmineral public lands in said counties lieu lands equal in value to those relinquished without the payment of fees or commissions.

Sec. 4. For the purpose of purchasing privately owned lands, together with the improvements thereon, within the boundaries above defined, there is hereby authorized to be appropriated, from any funds in the Treasury not otherwise appropriated, the sum of $481,879.38, which sum shall be reimbursable from funds accruing to the Navajo tribal funds as and when such funds accrue and shall remain available until expended: *Provided,* That title to the land so purchased may, in the discretion of the Secretary of the Interior, be taken for the surface only: *Provided further,* That said funds may be used in purchasing improvements on any land within said boundaries or as leased State school land within the boundaries above defined, provided the State of Arizona agrees to the assignment of said

leases to the Navajo Tribe of Indians on a renewable and preferential basis, and provided the Legislature of said State enacts such laws as may be necessary to avail itself of the exchange provisions contained in section 2 of this Act, and disclaim any right, title, or interest in and to any improvements on said lands.

Approved, June 14, 1934.

Appendix F

Navajo-Hopi Land Settlement Act of 1974, 25 U.S.C. § 640d-7
("Authorization to Commence Action")

§ 640d-7. Determination of tribal rights and interests in land

(a) Authorization to commence and defend actions in District Court

Either tribe, acting through the chairman of its tribal council for and on behalf of the tribe is each hereby authorized to commence or defend in the District Court an action against the other tribe and any other tribe of Indians claiming any interest in or to the area described in the Act of June 14, 1934, except the reservation established by the Executive Order of December 16, 1882, for the purpose of determining the rights and interests of the tribes in and to such lands and quieting title thereto in the tribes.

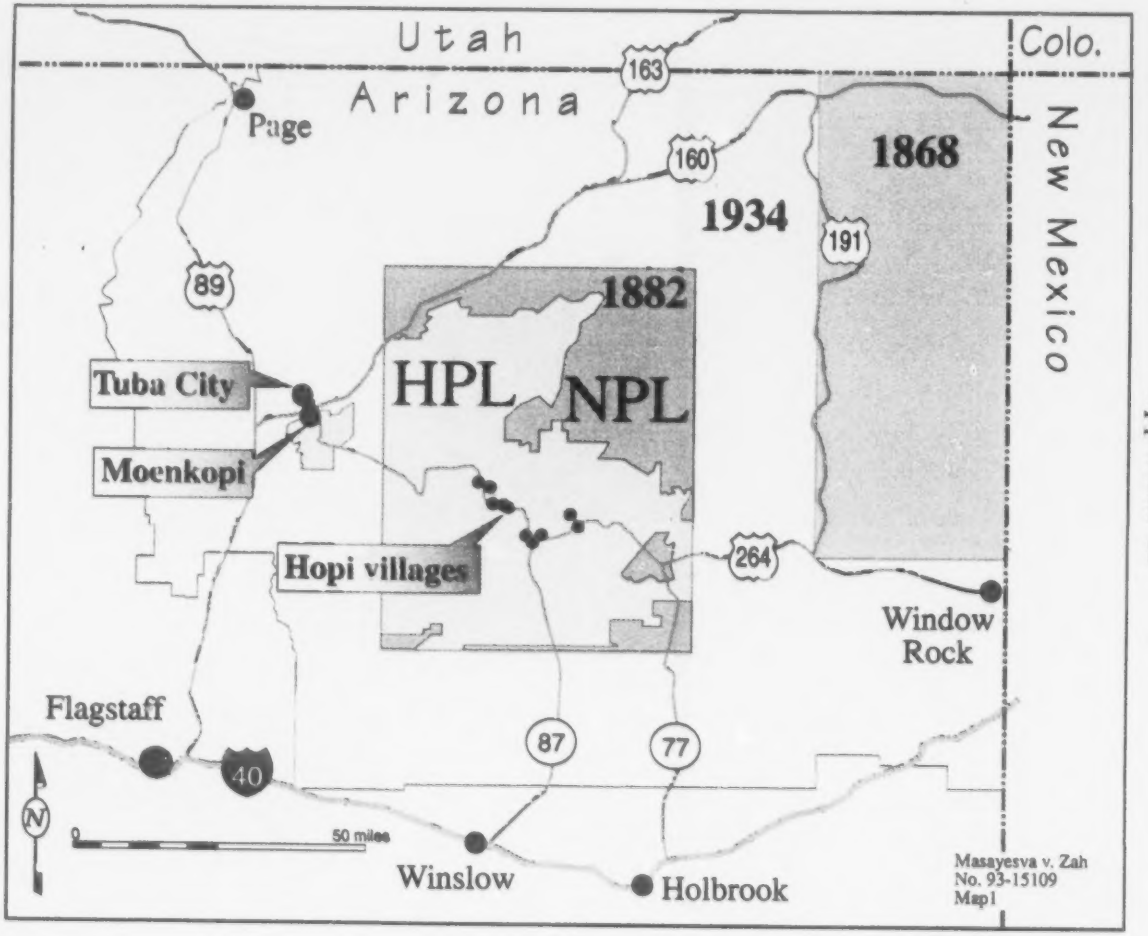
(b) Allocation of land to respective reservations upon determination of interests

Lands, if any, in which the Navajo Tribe or Navajo individuals are determined by the District Court to have the exclusive interest shall continue to be a part of the Navajo Reservation. Lands, if any, in which the Hopi Tribe, including any Hopi village or clan thereof, or Hopi individuals are determined by the District Court to have the exclusive interest shall thereafter be a reservation for the Hopi Tribe. Any lands in which the Navajo and Hopi Tribes or Navajo or Hopi individuals are determined to have a joint or undivided interest shall be partitioned by the District Court on the basis of fairness and equity and the area so partitioned shall be retained in the Navajo Reservation or added to the Hopi Reservation, respectively.

APPENDIX G — OPINION OF THE UNITED STATES DISTRICT COURT, DISTRICT OF ARIZONA, IN *HEALING V. JONES*, 210 F. SUPP. 125 (1962)

[omitted here but submitted separately as Lodging Appendix]

APPENDIX H — MAP OF THE 1934 ACT RESERVATION AND THE 1882 EXECUTIVE ORDER RESERVATION


Utah
Colo.
Arizona
New Mexico
Page
163
160
191
89
1868
1934
1882
HPL
NPL
Tuba City
Moenkopi
Hopi villages
264
Window Rock
Flagstaff
87
77
40
N
0
50 miles
Winslow
Holbrook
Masayesva v. Zah
No. 93-15109
Map1

APPENDIX I — HOPI EXHIBIT 263 - 54 EXECUTIVE ORDERS ADOPTED BETWEEN 1861 AND 1918

[omitted here but submitted separately as Lodging Appendix]

Supreme Court, U.S.
FILED
APR 4 1996
CLERK

(2)

No. 95-1422

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

FERRELL SECAKUKU, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, FOR AND ON BEHALF OF THE HOPI INDIAN TRIBE,
Petitioner,

v.

ALBERT HALE, PRESIDENT OF THE NAVAJO NATION, FOR AND ON BEHALF OF THE NAVAJO NATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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26 pp

QUESTION PRESENTED

The Hopi Tribe claims an interest in a part of the Navajo Reservation, the sole basis of that claim being a phrase in a 1934 Act of Congress mentioning "other Indians as may already be located thereon." The Hopi Tribe prayed that a portion of the Navajo Reservation be partitioned to the Hopi Tribe, the sole basis for that relief being a 1974 Act of Congress. After a lengthy trial, the district court examined the legislative history and purpose of each Act, then applied the plain meaning of the 1934 Act to adjudicate the Hopi claim and the plain meaning of the 1974 Act to partition the land. The court of appeals affirmed in relevant part.

The issue presented by the Hopi Tribe's petition is whether the district court and the court of appeals erred in not applying principles enunciated by the Indian Claims Commission in its adjudication of unrelated "aboriginal title" claims and whether the result in this case is inconsistent with, or should be controlled by, the result in another litigation between these two tribes involving a separate reservation established in 1882 by a presidential executive order that had a different history, different purpose and different language than the 1934 Act.

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The Act of December 22, 1974, 25 U.S.C. § 640d ..... *passim*

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BRIEF FOR THE RESPONDENT IN OPPOSITION

COUNTER STATEMENT OF THE CASE

From 1868 until 1934, the Navajo Reservation in Arizona grew as a patchwork of reservations created by an 1868 treaty and several statutes and temporary executive order withdrawals. [Pet. App. 267a-268a] In 1934, Congress consolidated, enlarged and confirmed the boundary of the Navajo Reservation for two reasons: Congress wanted to solidify control of land needed to support the Navajo people and the livestock on which they depended for subsistence, and the neighboring ranchers and local governments wanted to clarify ownership of "checkerboard" lands within Navajo territory and reach a clear, final delineation of Navajo lands.[1]

In 1934, as today, most of the Hopi people lived on the Hopi Reservation, a separate reservation created by a presidential executive order in 1882.[2] However, as Congress learned

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[1] Sen. Carl Hayden, the sponsor of the 1934 Act, explained the rationale of the legislative precursor of the Act: "The chief object of the bill is the elimination of the 'checkerboard' system of land control. ... Since 1868 the Navajo Indians in Arizona have increased in numbers. ... The bill conserves for these [Navajo] Indians a domain sufficient to support their flocks and herds." [Ex. 2469]

[2] *A Proposed Bill to Define the Exterior Boundaries of the Navajo Indian Reservation in Arizona: Hearing Before the Senate Comm. on Indian Affairs*, 72d Cong., 2d Sess. 10 (1932) (Ex. 2431) (Sen. Hayden, the 1934 Act's sponsor: "[The Hopis] are all [inside the 1882 Reservation] except a small settlement outside of the area over at a place called Moencopi."). When (continued...)

during the effort that led to the 1934 Act,[3] approximately 400 Hopi people lived on the Navajo Reservation in a village called Moenkopi. [Pet. App. 48a] In the course of the legislative process, the Senate appointed a special commissioner, who thoroughly investigated the situation at Moenkopi and recommended to Congress in 1932 that 35,200 acres adjacent to that village be set aside for the Hopis.[4]

As noted by the circuit court: "The 1934 Act is concerned primarily with Navajo affairs. ... The only mention of the Hopis in the 1934 Act is the provision excepting the 1882 reservation from the Act's effects." [Pet. App. 256a] Nevertheless, during that legislative process, Congress considered specific proposals that would have defined specific areas for the Hopis at Moenkopi and resolved various disputes between Hopis and Navajos on the Hopi Reservation.[5] When those efforts were frustrated by internal dissension among the Hopis, Congress elected not to try to solve all issues in a single

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[2] (...continued)
the 1882 executive order reservation was created, much of that area was already exclusively occupied by Navajo people. *See Healing v. Jones*, 210 F. Supp. 125, 144-45 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963). Nevertheless, the Hopi Tribe typically refers to the entire 1882 area as the "Hopi Reservation." That name is sometimes used herein without disrespect to the many Navajo families for whom that area is, and always has been, their sacred ancestral homeland.

[3] The Act of June 14, 1934, 48 Stat. 960, entitled "An Act [t]o define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes," is referred to herein as "the 1934 Act." The portion of the Navajo Reservation involved in the litigation is sometimes referred to as "the 1934 Reservation." [Pet. App. 295a]

[4] *Navajo Indian Reservation: Report of H. J. Hagerman*, S. Doc. No. 64, 72d Cong., 1st Sess. 47-49 (1932) (Ex. 2388).

[5] *Id.*

stroke and instead returned to the primary task of declaring the boundary of the Navajo Reservation. Ultimately, the 1934 Act recognized the right of Hopi people to remain "located" at Moenkopi and specified that the Act would not attempt to resolve conflicting claims to the Hopi Reservation:

> That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: [legal description omitted]. All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal *for the benefit of the Navajo and such other Indians as may already be located thereon*; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882.

The 1934 Act, § 1 (emphasis added). [Pet. App. 295a-296a]

Several decades later, the Hopi Tribe took the phrase "other Indians as may already be located thereon" out of its historical context and stretched it beyond recognition by asserting that the 400 Hopi individuals who resided in the village of Moenkopi were "located" on more than *3 million* acres of the Navajo Reservation. In other words, the Hopi Tribe argued—and continues to argue to this Court—that each Hopi man, woman and child residing in Moenkopi in 1934 was

actually "located" on 7,500 acres.[6] In 1974, Congress authorized the two tribes to resolve that issue in this litigation.[7]

A bifurcated trial took place in 1989-90 and 1992, after which the district court partitioned more than 61,000 acres to the Hopi Tribe, which is almost twice as much as the special commissioner recommended to Congress in the early 1930s.[8] The court of appeals largely affirmed, remanding only for further proceedings as to certain Hopi religious sites.

As a final note, the Hopi petition features an unfortunate, venomous "background" statement that begs to be

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[6] The Hopi Tribe argues that some of the Hopis living on the Hopi Reservation sometimes used parts of the Navajo Reservation. However, in *Healing v. Jones*, the court held that Hopi use of the Hopi Reservation was substantially confined to "District 6," a diamond-shaped area of about 631,000 acres in the middle of the 1882 executive order area [210 F. Supp. at 133, 173], and in this case the district court found as a matter of fact that Hopis from the Hopi Reservation did not make substantial use of the areas outside the boundaries of the 1882 executive order reservation. [Pet. App. 71a-77a, 99a-100a & n.108, 116a, 119a]

[7] The Act of December 22, 1974, 25 U.S.C. § 640d-7, referred to herein as "the 1974 Act," waived sovereign immunity of the two tribes for the limited purpose of this litigation, conferred jurisdiction on the district court, specified the remedies the district court could employ, and decreed the standards applicable to those remedies. [Pet. App. 301a]

[8] The Hopi Tribe complains [Pet. 7] that 61,000 acres are less than one percent of 3 million acres, which is apparently meant as criticism of the district court. If anything, however, that statistic merely underscores the audacity of the Hopi Tribe's claim. The Hopi Tribe states that there are 300,000 members in the Navajo Nation and 8,000 in the Hopi Tribe, and that the Navajo Reservation consists of 17 million acres and the Hopi Reservation amounts to 1.6 million acres. The Hopi Tribe's own figures show that Hopi land per capita is already almost *four times* as much as that of the Navajo (200 acres per Hopi, compared to 56.7 acres per Navajo), even though Hopis are concentrated in villages and Navajos live in disbursed settlements so they can best use the land to support their livestock and crops.

corrected, then forgotten. The Hopi petition [at 3] drags out hoary half-truths about alleged Navajo "depredations" during a prior century, citing the *Healing* decision. However, as the Hopi Tribe well knows, the discussion in *Healing* relates *only* to events that may or may not have happened *more than a hundred years ago* on *different land*, involving *different individuals* than those who were living in the Moenkopi area in the 1930s. To the extent the Hopi petition attempts to taint all Navajo people with an image of lawlessness based on allegations about a few individuals long deceased, it is a generalized attack on an ethnic group of the sort that must not be tolerated anywhere in our society and is beneath the dignity of this Court.

SUMMARY OF ARGUMENT

This case is determined entirely by two unique federal statutes that apply *only* to the Navajo Reservation and are germane *only* to the litigants in this action: First, the Hopi claim arises solely under the 1934 Act, and the claim must be resolved by applying the language of that Act, as the district court and the court of appeals appropriately did. Second, the jurisdiction and authority of the district court in this unique case spring from the 1974 Act, which required that any partitioning be made on the basis of "fairness and equity." The rulings of the district court under both statutes are grounded on detailed findings of fact concerning Navajo and Hopi land use. In separate trials, the district court examined historical land use in the 1930s to determine where Hopis were "located" when the 1934 Act was passed, then studied more current land uses to determine the fairness and equity of various alternative partition lines.

The Hopi Tribe claims that "the Ninth Circuit's judgment is contrary to decisions of this Court and other federal courts." [Pet. 2] That is not correct. No court, including this Court, has interpreted or applied the 1934 Act or the relevant provisions of the 1974 Act, other than in the course of this

particular litigation. Hence, no decision exists to which the court of appeals' judgment could be contrary. The Hopi Tribe errs by measuring the consistency of the court of appeals' judgment against cases interpreting *other* congressional acts or executive orders—each with its own unique history, purpose and language—that established *other* Indian reservations. The Hopi Tribe cites no authority for the proposition that such a comparison is appropriate.

The Hopi Tribe focuses on the opinion of a three-judge court in the District of Arizona in *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963), and argues that the court of appeals in this case impermissibly strayed from the teachings of that decision. That argument is faulty for several reasons. Although *Healing* involved the same parties (the Navajo Nation and the Hopi Tribe), it was based on particular facts that related to a different reservation—the Hopi Reservation, created for a different purpose pursuant to an 1882 executive order containing different granting language than that used by Congress in the 1934 Act. In any event, to the extent this case and *Healing* can be compared at all, they are in harmony, and the Hopi Tribe simply misconstrues the *Healing* opinion to attempt to manufacture a conflict where none exists.

Finally, the Hopi Tribe asserts that the court of appeals' judgment represents a "profound unfairness to the Hopi Tribe." [Pet. 2] To the contrary, the court of appeals not only applied the 1934 and 1974 Acts correctly, it affirmed a result that is eminently fair by any standard. The Hopi Tribe received every bit of land on the 1934 Reservation "used in any significant way" by Hopis at the time of the 1934 Act, *and* "all areas currently used" by Hopis. [Pet. App. 203a]

REASONS FOR DENYING A WRIT

A. This case was decided in the lower courts on the basis of intensive factual determinations not appropriate for this Court's attention.

Clearly, the key phrase in the 1934 Act is "located thereon," which the district court fairly and properly construed as follows:

> The Court finds that the use by Hopi Indians must be substantial and sufficiently intensive in order to create a property interest in the 1934 Reservation, though the use does not have to be for subsistence purposes. Use by a few isolated individuals, especially when away from traditional use areas of that individual's Tribe, and irregular or sporadic uses are not sufficient. However, since seasonal use is pervasive in Indian land use patterns, and indeed, necessary in the harsh environment of the 1934 Reservation, substantial seasonal use is sufficient for this Court to find occupation or use of the land.

[Pet. App. 45a-46a] The court of appeals affirmed. [Pet. App. 9a-10a ("[T]he district court correctly construed the statutory phrase 'located' in this statute.")] The Hopi Tribe's dissatisfaction with this outcome does not warrant consideration by this Court.[9]

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[9] The Hopi Tribe argues that this Court should grant certiorari merely because this case involves Indian sovereigns and Indian land, but that is not a sufficient reason to grant review. In 1980, this Court declined to grant a writ in this very case [*Sekaquaptewa v. MacDonald*, 449 U.S. 1010 (1980)] and numerous other examples exist where certiorari has been denied in cases involving Indian sovereigns and Indian land. *E.g.*, *Omaha Indian Tribe v.*

(continued...)

The Hopi Tribe mischaracterizes the district court's decision when it asserts that "[t]raditional land uses" such as "the gathering of plants for food and medicine, the collection of materials for tools and crafts, hunting, and similar practices were *disqualified*." [Pet. 6-7 (emphasis added)] In truth, the district court did *not* "disqualify" such "traditional land uses," but instead weighed the evidence regarding those activities and found that the Hopis had not carried their burden of proving that they had been "located" at the sites of such transitory activities in 1934. [Pet. App. 117a-120a] For example, in reviewing the evidence of the gathering of "greens, herbs, vegetables, fruits, seeds and berries," the district court found as a matter of fact that:

> the evidence shows most of the plant gathering took place close to Moenkopi and that gathering outside of this area was irregular and often depended on where a person was traveling.

[Pet. App. 117a] Similarly, the district court reviewed the evidence of Hopi hunting and found as a matter of fact that:

> Evidence indicates, however, that by 1934, rabbits were the only wild game hunted by the Hopis, and many rabbits were found in the Moenkopi vicinity.

[Pet. App. 120a-121a] Overall, the district court provided exhaustive citations to the voluminous record in considering the minutiae of Hopi land use to determine where the Hopis truly were "located." [Pet. App. 117a-122a]

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[9] (...continued)
Tract I - Blackbird Bend Area, 933 F.2d 1462 (8th Cir.), *cert. denied*, 502 U.S. 942 (1991); *Absentee Shawnee Tribe v. Kansas*, 862 F.2d 1415 (10th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989).

The Hopi Tribe asserts, without a single citation to the record, that:

> Uncontradicted evidence showed that Hopis both from Moenkopi and from the mesas inside the 1882 Reservation made regular use of the 1934 Reservation for a variety of traditional activities, such as residence, farming, grazing, gathering eagles for ceremonial purposes, visiting shrines, hunting, gathering plants, and obtaining materials for economic and religious purposes. Further uncontradicted evidence showed that these activities were, and continue to be, essential to the Hopi way of life.

[Pet. 5] To the contrary, the evidence did not show "regular use" outside the vicinity of Moenkopi. The evidence showed, at most, occasional episodes of Hopi use that were sporadic, infrequent, fleeting and inconsequential, from which the district court sensibly and correctly concluded that Hopis were not "located" at the far flung places of such activities, as the Congress intended the word "located" to be used in the 1934 Act.[10]

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[10] For example, the district court found no basis for Hopi use claims based on: *gathering ceremonial plants*, which (i) "was sporadic and at irregular intervals," and (ii) mostly occurred around the vicinity of Moenkopi and outside the 1934 Reservation [Pet. App. 116a]; *ceremonial hunting*, which was not intensive, and where by the 1930s, Moenkopi Hopis "were no longer hunting foxes and coyotes," and the "deer were almost extinct in LMU3" [Pet. App. 116a-117a]; *subsistence hunting*, which by 1934 was limited to rabbits, many of which "were found in the Moenkopi vicinity" [Pet. App. 120a-121a]; *gathering edible plants*, which mostly occurred "close to Moenkopi" and where "gathering outside [that] area was irregular and often depended on where a person was traveling" [Pet. App. 117a]; *gathering pinon nuts*, where (i) pinons were only gathered "once a year," (ii) "because pinons ripen in an area only once every five to seven years, Hopis went to different places every year," and (iii) "pinon nuts were rarely found and 'unusual' in the Hopi diet"

(continued...)

B. This case involves two unique federal statutes that apply only to the Navajo Reservation and are germane only to the litigants in this action.

1. The concept of "aboriginal title" does not apply to this case.

The Hopi Tribe's current reliance on "aboriginal title" is puzzling: From the outset of this litigation, the Hopi Tribe consistently and repeatedly asserted that its claim was based on "recognized title," *not* "aboriginal title."[11] The lower courts agreed. [Pet. App. 12a (the court of appeals noted that "the Hopis are not litigating their aboriginal title to these lands, but rather the recognized title conferred on them by the 1934 Act"); Pet. App. 44a (the district court found that "[t]he Hopi Tribe's claims in this case are based on *recognized title* granted by the 1934 Act")]

An Indian tribe acquires "recognized title" to a parcel of land when the United States government conveys that land by

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[10] (...continued)
[Pet. App. 118a]; and *gathering firewood*, which (i) by 1934, "had become scarce" within the 1934 Reservation and gathering "was waning," (ii) mostly took place outside the 1934 area, and (iii) was often replaced by "alternative forms of fuel, such as brush, greasewood, and corncobs from Hopi fields" [Pet. App. 119a-120a].

[11] In a 1977 brief, the Hopi Tribe stated: "The case at bar is *not based on aboriginal interests*. The subject of this action is the legal rights and interests *created* for the Hopi and Navajo Tribes in lands outside the 1882 Reservation *by the 1934 Act*." [Hopi Reply Memorandum (6/3/77) at 6 (emphasis added)] At the same time, the Hopi Tribe argued—contrary to its current position—that the decisions of the Indian Claims Commission "are poor precedents as a result of the vastly differing issues and other policy considerations involved in apportioning money judgments between Indian groups." [Hopi Response to Navajo Motion for Partial Summary Judgment (5/16/77) at 55]

treaty, executive order or statute. Congress has broad discretion in conveying "recognized title" to an Indian tribe,[12] and Congress exercised that discretion in the 1934 Act. When "recognized title" has vested, it cannot be taken from the tribe without compensation. *E.g.*, *Chippewa Indians v. United States*, 301 U.S. 358, 375-76 (1937). In contrast, "Indian title" (also known as "aboriginal title") is a right of occupancy that is freely extinguishable by the United States government. Congress regularly extinguished occupancy rights by creating Indian reservations that were smaller than a tribe's aboriginal territories.[13]

The "unbroken line of cases" on which the Hopi Tribe relies [Pet. 8] arises from the specialized work of the Indian Claims Commission, a unique tribunal created in 1946 to disburse money to Indian tribes to compensate them for the loss of their traditional lands as European Americans marched across this continent. [Pet. App. 11a-12a] *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW at 491-92 (1982 ed.)

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[12] *See, e.g., Lone Wolf v. Hitchcock*, 187 U.S. 553, 565-66 (1903) ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the government."); *Northern Cheyenne Tribe v. Hollowbreast*, 349 F. Supp. 1302, 1306-07 (D. Mont. 1972), *aff'd*, 425 U.S. 649 (1976) ("Congress has plenary power to deal with Indian affairs and property.").

[13] *See, e.g., Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 279, 288-91 (1955) ("[Indian title] means mere possession not specifically recognized as ownership by Congress. ... This is *not a property right* but amounts to a right of occupancy which... may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians.") (emphasis added); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 347 (1941) ("The power of Congress [to extinguish Indian title based on aboriginal possession] is supreme. The manner, method and time of such extinguishment raise political, not justiciable, issues.").

("The Indian Claims Commission Act was a congressional program of limited retrospective compensation for extinguishment of Indian title."). The work of the Indian Claims Commission does not apply to the present Hopi claim for several reasons. First, the Commission did not deal with claims for land, since it was authorized *only* to dispense money and was *not* empowered to return the tribes' aboriginal lands to them.[14] Second, compensation was not disbursed to compensate *legal* claims, but was a matter of "grace," appealing to the conscience of the government to right the "moral" wrongs that occurred in the course of hundreds of years of dealings with the indigenous inhabitants of this land.[15] Accordingly, the Commission developed and applied a very generous standard to compensate for those moral wrongs. Third, the Commission dealt only with claims against the federal government, not claims between Indian tribes. Finally, as the court of appeals properly noted:

> The line of cases on which the Hopis rely to construe the phrase "possession, occupation, or use" began twelve years after the 1934 Act was passed. Congress could not have meant to use a meaning not yet given to a phrase it did not use, when it wrote "located" into the 1934 statute.

[Pet. App. 12a]

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[14] *See Navajo Tribe v. New Mexico*, 809 F.2d 1455, 1461 (10th Cir. 1987) (the only relief available from the Indian Claims Commission is money: "No lands would be returned to a tribe.").

[15] *See Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 281-282 (1955) ("Generous provision has been willingly made to allow tribes to recover for wrongs, as a matter of grace, not because of legal liability."); Margaret H. Pierce, *The Work of the Indian Claims Commission*, 63 A.B.A.J. 227, 229 (1977) (such claims for monetary recompense were not based on law, but were "'moral claims' appealing to the conscience of the government to right wrongs occurring in the course of its dealings with the Indian tribes.").

Indeed, the Hopi Tribe had no choice but to disclaim any reliance on aboriginal title. Before this case was filed, the Indian Claims Commission decided (and the Court of Claims later affirmed) that creation of the Hopi Reservation in 1882 extinguished any aboriginal title claim the Hopi Tribe may have had to land outside that reservation. [Pet. App. 273a-275a][16] In fact, the Hopi Tribe has been compensated under the Indian Claims Commission Act for the taking of its aboriginal lands outside the 1882 reservation, so any attempt by the Hopi Tribe to obtain land on the basis of "aboriginal title" would be an improper second bite at the apple, which the lower courts properly rejected. [Pet. App. 45a ("The Hopi Tribe may not have a second chance at establishing its claims of aboriginal title.")]

Even if the Hopi Tribe had not clearly admitted that its claim herein is solely based on "recognized title" and governed by the language of the 1934 Act, the Hopi argument for dragging the "aboriginal title" doctrine into this case would fail. The Hopi Tribe has never adequately explained how the teachings of the Indian Claims Commission—which was not even established until 1946—supposedly became grafted onto the 1934 Act. The only support the Hopi Tribe now offers is a misreading of the legislative history of the 1934 Act. The Hopi Tribe states that the Indian Office reassured the Hopi Tribe that the 1934 Act "would not diminish their historic occupancy rights." [Pet. 4] Agents from the precursor of today's Bureau of Indian Affairs did conduct meetings in Hopi villages at which the proposed legislation was explained. *A Proposed Bill to*

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[16] *Hopi Tribe v. United States*, 23 Ind. Cl. Comm. 277, 284-85 (1970) ("[T]he December 16, 1882 Presidential Order effectively terminated and put to rest all Hopi aboriginal title claims beyond the limits of the 1882 Hopi Executive Order Reservation."), *reh'g denied*, 31 Ind. Cl. Comm. 16, 23, 28, *aff'd*, No. 13-74 (Ct. Cl. January 31, 1976).

Define the Exterior Boundaries of the Navajo Reservation in Arizona: Hearing Before the Senate Comm. on Indian Affairs, 72d Cong., 2d Sess. 29 (1932). At those meetings, however, government representatives consistently explained that the purpose of the Act was to define the boundaries of the Navajo Reservation, and to the extent the legislation would affect the Hopis at all, it would "protect the rights of the Hopi Indians to the lands they occupy around here" [*id.* at 34, 39] and "protect their [Hopi] rights to the lands they are now using and occupying" [*id.* at 68]. Nothing in the legislative history of the 1934 Act suggests that Congress intended to incorporate an "aboriginal title" standard for determining where the Hopis were "located" in 1934, nor is there even a hint that Congress intended to give the Hopis an interest in 3 million acres.

The Hopi Tribe argues that the same standards should apply to both aboriginal title and recognized title [Pet. 10], but that is not the law and the cases cited in the Hopi petition do not support that argument. For example, the excerpt cited from *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 746 (1835), was merely an observation about the protection accorded under English and Spanish law to tribes whose lands had been acquired by those conquering nations. *Id.* at 745-46. *Mitchel* did not address conflicting land claims of two tribes or a congressional grant to an Indian tribe. It instead acknowledged that under English and Spanish law, "Indian title" was a mere "right of possession" freely extinguishable by the crown.

In short, whether the Hopi people may once have held "aboriginal title" to a portion of what is now the Navajo Reservation is beside the point. The Hopi Tribe's "aboriginal" rights were *extinguished* in 1882 when the United States established the Hopi Reservation, and the Hopi Tribe's *only* possible claim to any portion of the Navajo Reservation is through "recognized title" arising from the "other Indians" language in the 1934 Act.

2. The decision of the district court in *Healing v. Jones* does not support the Hopi argument.

The Hopi Tribe asserts that the decision in *Healing v. Jones* supports its aboriginal title theory [Pet. 4-5], but it misconstrues the *Healing* decision. As a threshold matter, *Healing* is not a valid precedent because that case construed and applied the 1882 executive order, which used different language than that of the 1934 Act.[17]

But even if the *Healing* case were germane, that decision did *not* apply the "aboriginal title" standard now urged by the Hopi Tribe. To the contrary, the court in *Healing* held that the Navajo Nation could obtain an interest in the 1882 reservation only if Navajo people had "used and occupied the reservation, in Indian fashion, *as their continuing and permanent area of residence.*" *Healing*, 210 F. Supp. at 144 (emphasis added).

The Hopi Tribe implies that *Healing* awarded lands to the Navajo Nation based on sporadic grazing and intermittent hunting or gathering, but nothing supports that implication. [Pet. 7, 12] The test adopted in *Healing* required the Navajo to prove that they used the lands as their "continuing and permanent area of residence" *and* the court specifically stated that its ruling was based on the Navajo's *residential* use of the entire area awarded. After discussing the dramatic recovery of the

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[17] The 1882 executive order used the verb "settle," as to which the Navajo Nation suggested the following meaning: "Indians other than the Hopis are to be regarded as settled in the reservation... if they use and occupy such lands for residential and incidental purposes, in Indian fashion, *and* if such use and occupancy is of a continuing and permanent nature as opposed to a transitory or temporary occupancy." *Healing*, 210 F. Supp. at 143 (emphasis added). Thus, the standard suggested by the Navajo Nation in *Healing* is remarkably like the standard applied by the district court and court of appeals in this case, but in the final analysis the court rejected the Navajo suggestion and applied its own, more restrictive standard in *Healing*.

Navajo population after the internment of most of the Navajo people at Fort Sumner, New Mexico, in the 1860s [*Healing*, 210 F. Supp. at 135], the district court concluded:

> The use and occupancy of the reservation area for *residential purposes* by a constantly increasing number of Navajos, is therefore *definitely established*, and we have so found.

Id. at 145 (emphasis added). Nothing in *Healing* suggests (nor has the Hopi Tribe cited any evidence to indicate) that the court in *Healing* relied on Navajo hunting, gathering or other such transitory activities to establish where Navajos were "settled." The Hopi Tribe is simply incorrect when it argues that the standard applied by the district court and court of appeals in this case is inconsistent with, more stringent than, or precluded by, the *Healing* decision.

3. The lower courts properly applied the plain meaning of the 1934 Act.

The Hopi Tribe claims that the court of appeals ignored the plain meaning of the 1934 Act.[18] On the contrary, the court of appeals attributed the commonly understood meaning to the statutory term "located," explaining that it "was not a term of art connoting lands which people merely passed over occasionally or otherwise used to a very low level of intensity." [Pet. App. 10a][19] Furthermore, the court of appeals found that

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[18] Curiously, the Hopi Tribe at the same time argues that the plain meaning of the 1934 Act was *not* the proper construction: "There is more to the case than the interpretation of a single word." [Pet. 9]

[19] The court of appeals' definition is consistent with the plain meaning of the word in 1934. *See, e.g.*, WEBSTER'S NEW INT'L DICTIONARY 1266 (continued...)

the district court's construction was consistent with the appellate court's 1980 holding in this litigation and was "well designed to serve the purpose of the 1934 Act." [Pet. App. 10a] The primary purpose of the 1934 Act was to define a *Navajo* reservation and only secondarily to allow Hopis to remain where they were located at the village of Moenkopi. [Pet. App. 256a] As the court of appeals stated in its earlier decision:

> The purposes, history, and language of the 1934 Act show an intent to withdraw all reservation land for the Navajos except for pockets occupied by Hopis. We agree with the district court that this is the meaning of the "such other Indians as may already be located thereon" provision.

[Pet. App. 260a] Thus, the lower courts' construction of the 1934 Act is consistent with the only applicable court of appeals authority, and there is no conflict that justifies the intervention of this Court.

The Hopi Tribe also argues that the rulings below were incorrect because they were "unnecessary," suggesting (without explanation) that the courts could have considered an option such as eminent domain. However, in 1974, Congress elected not to exercise the government's power of eminent domain but instead to authorize the Navajo Nation and the Hopi Tribe to

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[19] (...continued)
(1930) (Locate: "To set or establish in a particular spot or position; to settle; station; place." Location: "Situation; place; locality; specif[ically] place of residence or settlement; as, to have a desirable *location*"); NEW CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 970 (1927) (Locate: "To set, fix, or establish in a place, situation, or locality...; place; settle [t]o establish one's self in a place... [t]he act of locating, or the state of being located; position, situation, or settlement in a place; hence, a place or situation occupied").

resolve their differences through litigation.[20] The litigants have since followed the path chosen for them by Congress, and it is not the province of the courts to second-guess whether Congress might have specified a different course.

4. The final judgment of the district court was fair, equitable, just, and consistent with the plain meaning of the 1974 Act.

The 1974 Act requires that "[a]ny lands in which the Navajo and Hopi Tribes...are determined to have a joint or undivided interest shall be partitioned by the District Court *on the basis of fairness and equity*..." (emphasis added). [Pet. App. 301a] "Fairness and equity" depend solely on the facts of this case. Certiorari is not an appropriate vehicle to review a trial court's findings of fact, especially when they already have been reviewed and affirmed by a court of appeals.[21] Even if this court were inclined to wrestle with the myriad facts that can and should affect "fairness and equity," no amount of time spent reviewing the cold record could approach the level of the district court's understanding of the lives of the Navajo and Hopi people. The district court visited the disputed lands, saw Navajo and Hopi homes, became intimately familiar with Navajo and Hopi beliefs and lifestyles, heard from lay and expert

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[20] On November 23, 1974, four United States Senators wrote to the other Senators during Congress's consideration of the 1974 Act, expressing concern that an arbitrary division of the land between the two tribes would result in a takings claim against the government. [Ex. 5272]

[21] *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) ("[T]his Court has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts."); *Graver Tank Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error.").

witnesses and studied voluminous exhibits, and then made exhaustive findings of fact to support its decision that the partitioning was fair and equitable. In the final analysis, the district court awarded the Hopi Tribe all lands "used in any significant way by the Hopis in 1934" and "all areas currently used" by the Hopis. [Pet. App. 203a]

The partition line adjudicated by the district court does not require any family—Navajo or Hopi—to be removed from its home. The Hopi Tribe does not like that result and considers it to be unfair. Incredibly, the Hopi Tribe accuses the district court of being "unprincipled" because it supposedly sought "to avoid any possibility of relocation." [Pet. 13] Apparently the Hopi Tribe believes the district court should have welcomed the opportunity to precipitate the ugly spectacle of federal marshals dragging people from their homes. The Hopi argument appears to be that the statutory mandate to partition the land on the basis of "fairness and equity" prohibited the district court from attempting to minimize such human suffering.

Avoidance of relocation is particularly fair and equitable in the case of the Hopi claim to sites where its members merely engaged in sporadic "traditional uses" such as hunting and gathering, since the Hopi Tribe is, in effect, arguing that Navajo families should be forced from their homes if any Hopi individual wandered past the Navajo homes while picking herbs or chasing rabbits sixty years ago. The district court should be commended, not criticized, for rejecting such a cynical and overreaching claim and for following the statutory mandate of "fairness and equity" in a manner that permits both the Navajo and Hopi people to remain where they are.

CONCLUSION

The Hopi Tribe's petition for a writ of certiorari should be denied.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1995

FERRELL SECAKUKU, Chairman of the Hopi Tribal Council of the Hopi Indian Tribe, for and on behalf of the Hopi Indian Tribe,

Petitioner,

vs.

ALBERT HALE, President of the Navajo Nation, for and on behalf of the Navajo Nation,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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FURTHER REASONS FOR GRANTING THE WRIT

The Navajo Nation fails to respond, because it has no convincing answer, to the central argument in the Hopi Tribe's petition for a writ of certiorari, which is this: The courts below applied an unprecedented and restrictive test for measuring Indian land use, a test never before applied by any federal court in any reported decision in the 150-year history of cases adjudicating Indian land rights.

The Navajo Nation seeks to justify this restrictive test on the ground that the 1934 statute is unique. It is not. As discussed at length in the Hopi Tribe's petition, and not contradicted by the Navajo Nation, the phrase "other Indians as may be located thereon" is similar in all material respects to language in many executive orders and congressional grants, including those at issue in *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963). Pet. 10-12.

Nor can the Nation fairly dispute two facts. *Healing* explicitly applied the concept of "Indian title" in determining the Navajo Nation's recognized title to the Hopi Reservation. The courts below explicitly declined to apply the concept of "Indian title" in determining the Hopi Tribe's recognized title to the Navajo Reservation. Pet. 6. This differing treatment cannot be justified or explained, but it can yet be remedied, and the Hopi Tribe asks the Court to do so.

Respectfully submitted,

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